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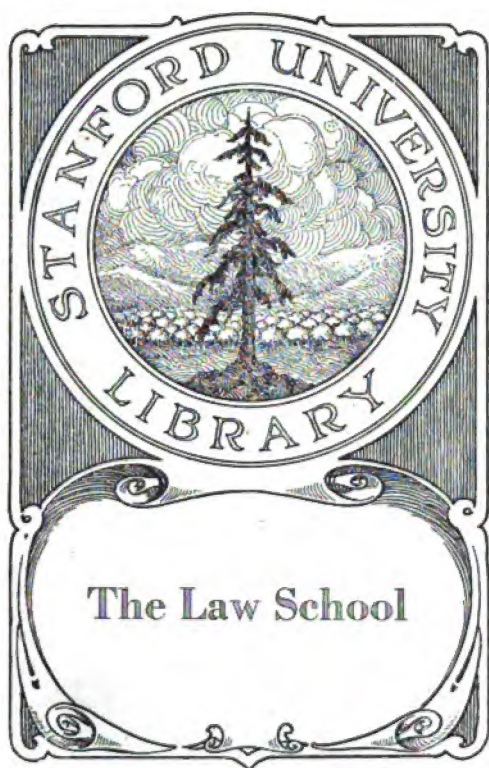
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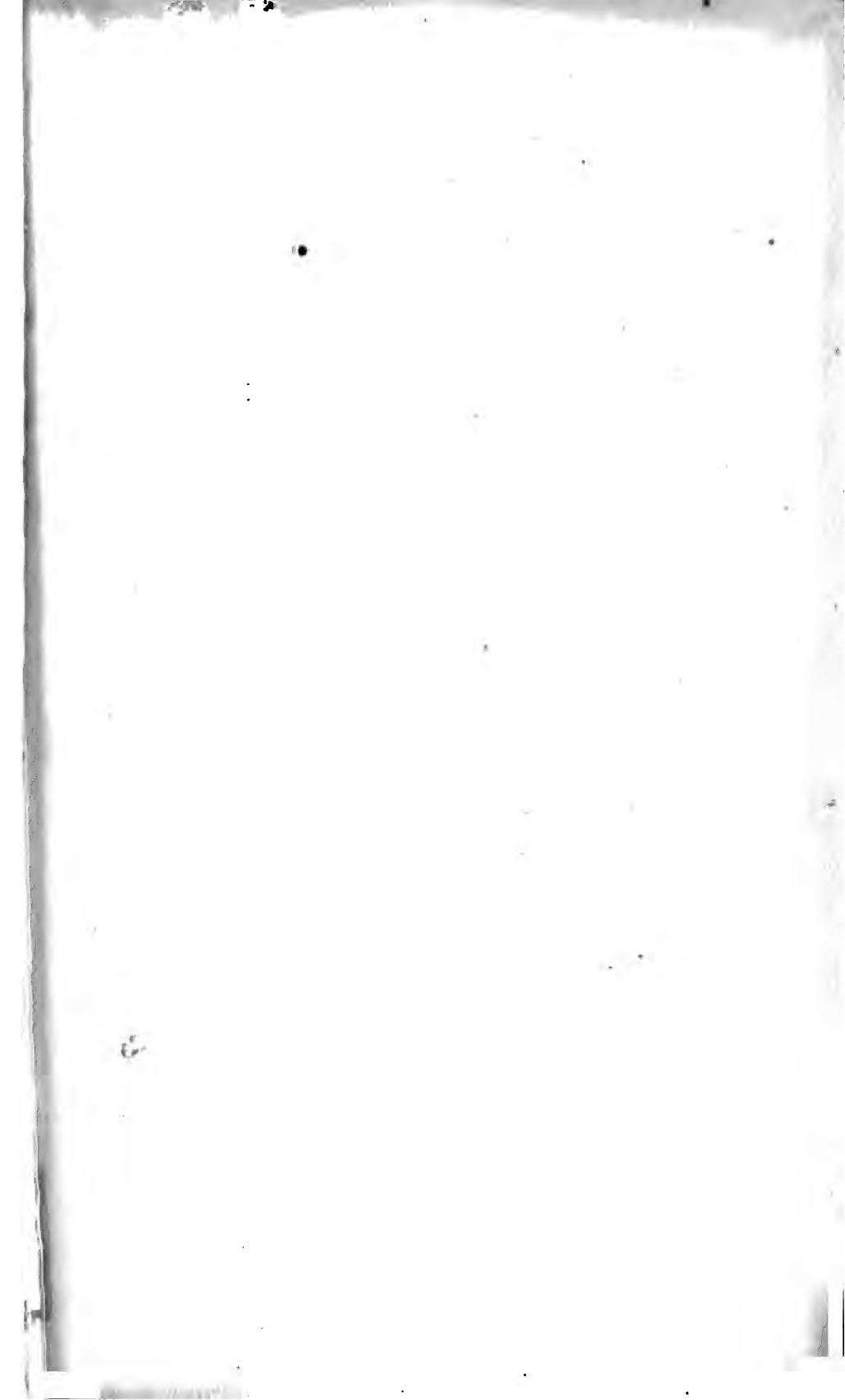
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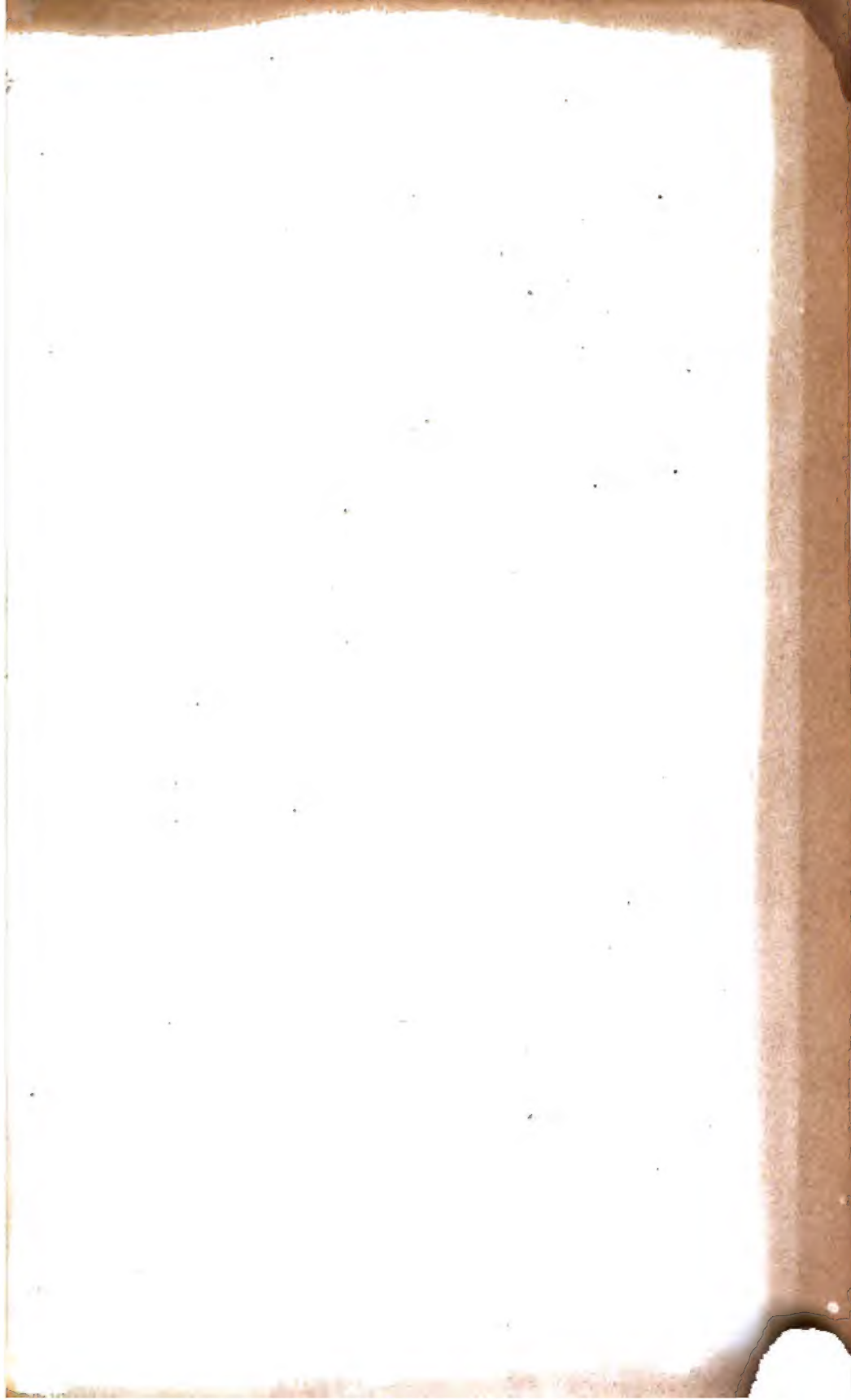
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PROBATE AND DIVORCE.

The Right Hon. LORD PENZANCE.⁵
 Right Hon. Sir JAMES HANNEN, Knt.⁶

¹ Sir WILLIAM FRY CHANNELL, resigned about the first of January, 1873, and died on the 25th of February. 54 Law Times, 163, 331, 8 Law Journal, 2.

² Mr. CHARLES EDWARD POLLOCK was appointed January 4th, 1873, to succeed SIR WILLIAM FRY CHANNELL. 54 Law Times, 196, 8 Law Journal, 21.

³ LORD HATHERLY resigned the office of Lord Chancellor about the 15th of October, 1872. 53 Law Times, 399, 7 Law Journal, 695.

⁴ On the 18th of October, 1872, Sir ROUNDELL PALMER, having been appointed, was gazetted Lord Chancellor under the title of Lord Selborne of Selborne. 53 Law Times, 406, 417. 6 Alb. Law Journal, 312; 7 Am. Law Review, 385.

⁵ Lord PENZANCE resigned the office of Judge of the Probate and Divorce Courts about the 1st of November, 1872. 54 Law Times, 3, 7 Law Journal, 743.

⁶ Sir JAMES HANNEN was appointed Judge of the Court for Probate and Divorce cases and took his seat as such on the 21st day of November, 1872. 54 Law Times, 31, 43, 275. Law Journal, 785, 822.

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ERRATA ET CORRIGENDA.

- Page 28 line 16 of note cite *People v. State Treasurer*, 24 Mich., 468.
 " 214 line 11 from bottom insert "paid" between word "fact" and words "the freight."
 " 814 end of note cite *Hamilton v. Third etc.*, 18 Abb. N. S., 818.
 " 390 end of note cite *Fox v. Prickett*, 34 N. J. Law Rep., 18; *Brady v. Whitney*, 24 Mich., 154.
 " 499 cite contra *Leavitt v. Dabney*, 37 How. Prac., 264.
 " 563 cite *Hamer v. Hamer*, 4 Strob (S.C.) Eq., 124.
 " 625 line 10 of note cite *Nugent v. O'Brien*, Blackham Dundas, and Osborn, 208.
 " 625 line 16 of note cite *Kirwan v. Hampton*, Blackham, Dundas and Osborn, 227.
 " 625 end of note cite *Queeley v. Warren*, Blackham, Dundas and Osborn, 160

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APPEAL CASES

BEFORE THE

HOUSE OF LORDS.

[Law Reports, 5 House Lord's Cases, 480.]

March 18, 19; April 11, 12, 1872.

*THE OVEREND & GURNEY COMPANY, Appellant; [480]

AND

THOMAS JONES GIBB AND JOHN DARBY GIBB, Respondents.

Company — Directors — Power and Liability — Pleading.

Facts which may show imprudence in the exercise of powers undoubtedly conferred upon directors will not subject them to personal responsibility; the imprudence must be so great and manifest as to amount to *crassa negligentia*.

Where the directors to whom these powers were intrusted, and who exercised them, were, by the "Company" which had conferred the powers, afterwards sought to be made responsible for their exercise:— *Held*, that malfeasance or *crassa negligentia* ought to have been distinctly charged.

The bill being defective in that respect:— *Held*, that it could not be sustained.

In a company formed for the purchase of a business where the power to make the purchase was distinctly conferred on the directors, though the character of the business turned out to be ruinous, unless that character was obviously apparent when the purchase was made, the directors will not be personally responsible for making it.

In this case a prospectus was, in the usual manner, issued by the directors, but that prospectus in no way whatever affected the claim of the Plaintiff company to compensation for loss consequent on the purchase of the business, for the company was formed for the express purpose of purchasing the business, and was not induced to take that step by any previously-issued prospectus.

An agent (and the directors here were rather agents or mandatories than trustees) being authorized to do an act in itself imprudent, and one which the principal ought not, as a matter of prudence, to have authorized, is not to be held responsible for the consequences of doing it.

*Turquand v. Marshall*¹ explained.

This was a bill filed by certain persons who claimed to constitute a company called the "*Overend & Gurney Company*,

(¹) Law Rep., 4 Ch. Ap., 376.

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Overend & Gurney Co. v. Gibb.

Limited," against the persons originally appointed directors of that company. The present Respondents were the executors of a Mr. *Thomas Augustus Gibb*, who had been one of the original directors. The bill (which is fully set out in the report of the case in the Court below ⁽¹⁾, and is frequently quoted in the judgments of their Lordships) stated in substance that a 481 firm of bill brokers, named **Overend, Gurney & Co.*, had existed for many years and attained a very high commercial reputation, and its business was universally supposed to be most successful and profitable; that in 1857 the firm sustained heavy losses, large accounts were due to the firm, and these and certain investments, amounting together to £2,782,879, were regarded by the firm with alarm; that in June, 1865, the partners knew that they were involved to the extent of £2,000,000; that the partners and *T. A. Gibb* devised a project for the formation of a company to take over all the liabilities of the firm, and that an arrangement for that purpose was afterwards made in a memorandum and articles of association; that the memorandum, signed by the Defendants and registered the 12th of July, 1865, contained the following (among other) provisions: "3. The objects for which the company is established are, the receiving of money on deposit, or by rediscount of bills, and the employment and investment of such money, and of the paid-up capital of the company, in the discounting of bills of exchange, promissory notes, and other negotiable securities, and in making advances on loan and investing in securities, and generally the carrying on the business of bill brokers and money dealers, as heretofore carried on by Messrs. *Overend, Gurney & Co.*, at No. 65, *Lombard Street*, in the city of *London*; and with a view to the above objects, the acquisition of such business upon terms to be agreed upon by the directors, and the acquisition, whether by way of purchase, or amalgamation, or otherwise, of such other business or businesses of a like character, and upon such terms, as the directors shall think expedient, and the doing of all acts and things incidental to, or conducive to, the attainment of the above objects." (See, on the subject of an alteration in this memorandum, *Oakes v. Turquand* ⁽²⁾.)

There were also articles of association drawn up in a similar form, and a prospectus, which set forth some of the terms of

⁽¹⁾ Law Rep., 4 Ch. Ap., 701.

⁽²⁾ Law Rep., 2 H. L., 326-329-333.

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Overend & Gurney Co. v. Gibb.

the purchase, of which this prospectus said they were "terms which in the opinion of the directors cannot fail to insure a highly remunerative return to the shareholders." The vendors were represented as "guaranteeing the company against any loss on the assets and liabilities transferred;" and at the end of the memorandum it was said, "Copies of the company's 482] memorandum and articles of association, *as well as of the deed of covenant in relation to the transfer of the business, can be inspected at the offices of the solicitors of the company."

The bill then alleged that the directors in July, 1865, completed the purchase, being aware of the insolvency of the firm, and that two indentures were executed (both of which were fully set out), and the bill charged them to be injurious to the interests of the company; and it was alleged that the second was not mentioned in the prospectus, nor made known to the members of the company, and that if it had been disclosed and the true state of the firm made known to the company, the purchase of the business, at any price, would have been refused. The bill also alleged several other matters of detail (one, that of not taking a sufficient guaranty from the partners of the old firm, leading to great losses on the part of the company, and prayed that the Defendants might be declared jointly and severally liable to make good the losses, that a receiver might be appointed, and for general relief. The Defendants demurred to the bill generally. Vice-Chancellor *Malins*, on the 28th of April, 1869, overruled the demurrer (!); but his decision was afterwards reversed by Lord Chancellor *Hatherley*. The present appeal was then brought.

Mr. *Cotton*, Q.C., and Mr. *W. Stewart Ferrers*, for the Appellant :

There is no reason on principle why this bill should not be maintained. It is not a bill to make the directors liable in unliquidated damages, but to recover from them that portion of the capital of the company which has been lost by their negligence. They were trustees for the company, and they have acted without that caution which trustees are bound to exercise. The case resembles that of a trustee to whom money has been left to invest for a particular purpose and for the benefit of a

(!) Law Rep., 4 Ch. Ap., 707, n.

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particular person, and he has invested it so badly that the purpose of that person's benefit is wholly prevented from taking effect. Where directors or committeemen are supinely negligent of the interests entrusted to their care, and thereby occasion a gross loss, they will be held liable: *Charitable Corporation v. 483* *Sutton* (1). That was so here. *[Many parts of the deeds were referred to with the view of showing that the interests of the company had not been attended to, and, among others, that a sufficient guaranty had not been taken to cover the company against losses from taking over the liabilities of the old partnership.] The company was formed before the prospectus was issued, and the directors must have known before they executed the deeds the true state of things — a state which rendered the purchase of the business and the adoption of the liabilities of the old partnership an absolutely ruinous speculation. When the company was formed power was, no doubt, given the directors to bind the company, but that power was a trust, and the directors were bound to use it with care and discretion, and if they neglected both, they became liable to make good the losses occasioned by their neglect. When they found that the circumstances of the partnership were such that the purchase of the business would not promote, but would seriously injure, the interests of the company, they ought to have declined to make the purchase. If they saw even strong reason to doubt the propriety of making the purchase, they ought to have held their hands until they had called a general meeting of the shareholders and laid the true state of the case before them. Instead of that, so far from giving full information to the shareholders, they kept back all knowledge of the second deed, and nobody doubted that if the shareholders had known of that deed the purchase of the business would have been rejected. [The LORD CHANCELLOR:—The object of the company was to carry on the business of bill brokers, and to do so by means of purchasing the business of *Overend & Gurney*. There is no charge in the bill that the conduct of the directors was fraudulent, or that they sought or obtained any particular advantage for themselves.] The directors knew that it was believed that the business must succeed. Before they completed the purchase they had learnt enough to know (as the bill clearly sets forth) that such belief

(1) 2 Aik., 400-433.

was utterly erroneous, and that the guaranty was entirely insufficient. They ought to have acted on this knowledge, or at least fairly and fully to have laid it before the company, to enable the shareholders to act on it.

A bill like the present is maintainable against persons standing in the situation of these directors: *The Society for the Illustration of Practical Knowledge v. Abbott* ⁽¹⁾. [484

Sir Roundell Palmer, Q.C., and Sir George Honynan, Q.C. (Mr. H. M. Jackson was with them), for the Respondents:

The bill contains no allegations of fraud. The case against the Respondents is, therefore, reduced to a charge of want of judgment in doing an act which the company gave them full authority to do. Such a bill is, therefore, of the first impression, and there is no authority showing that it can be maintained. There was no misrepresentation here; but if there had been, each shareholder deceived by it had his remedy at law, but the whole company could not maintain a bill like this against the directors: *Turquand v. Marshall* ⁽²⁾ is a very strong authority upon that point. The company knew, or had the opportunity of knowing, all the facts, and so had no claim to equitable relief: *Vigers v. Pike* ⁽³⁾. There was no allegation in the bill which showed a specific duty imposed on the directors, and an intentional, or even negligent, breach of that duty. The bill, therefore, sets out no title to relief.

Mr. Cotton replied. *Turquand v. Marshall* had not laid down a doctrine so sweeping as was supposed.

THE LORD CHANCELLOR (Lord Hatherley):

My Lords, in this case, which is one of a bill filed by persons constituting the disastrous concern, as it has proved to be, of the *Overend & Gurney Co., Limited*, in order to fix the representatives of a deceased director with the consequences of his having entered into an arrangement for the purchase of the business of the private firm of *Overend & Gurney*, I should not, it being an appeal from a decision of my own, have been anxious to express my own view in the first instance, had I not ascertained

(1) 2 Beav., 559.

(2) Law Rep., 4 Ch. Ap., 376.

(3) 8 Cl. and F., 562.

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Overend & Gurney Co. v. Gibb.

that there is no difference of opinion amongst your Lordships on the question which is at issue.

The points which have been laid before us are these :— A company was formed for the express purpose of purchasing the 485] concern *belonging to *Overend & Gurney* as a firm. I say for that express purpose; because, although there is a recital in the articles of association as to the purposes of the company, which states them to be the carrying on of the business of bill brokers, that is qualified by this expression, “ carrying on the business of bill brokers as now carried on by the firm of *Overend, & Gurney, Co.*” Then it proceeds to say that with the view of so doing it is intended to purchase that business. And the name and goodwill were, of course, intended to be purchased, for they could never have given the name of “ *Overend, Gurney & Co., Limited,*” to the new company except by the purchase of the business. They could by no possibility have acquired the right of using that well known designation, unless the purchase from the old firm had been made. And the subsequent words which are thrown in, namely, the words which imply a power or an intention also to purchase any other business of a similar character, are merely words which are concomitant with the main act and object for which the company was formed, namely, the purchase of the business of *Overend & Gurney*.

Then it is said, true it is this was the object of the company, which everybody entering into the company understood to be its true intent and object; true it is that in the articles which were entered into on the formation of the company powers are given for the purpose of making this purchase, and that the intention of everybody was to do that. But at that time the firm was considered to be carrying on a first class business; its credit was at the highest possible point, and we, the persons who entered into this company, all thought that we were about to purchase that which would be a flourishing concern, and not one which would be a source of ruin and destruction to us all, at least as regarded the amount of money which we were to invest in the purchase.

Now, the way in which the case is put is, that the directors, who, beyond all dispute, had a clear power and authority to make the purchase, in the course of making it became aware of facts which if they had been known before the formation of

the company, or even before the instruments were signed which effectually bound the company in making the purchase, if they had been known to any of the shareholders as they were known to the directors, *would have stopped at once the pur- [486 chase, or ought to have made the directors refuse to enter on it. In other words, it is contended, that the directors were placed in such a position by those facts which they ascertained, that they should at once have held their hands, and have done one of two things—it is not very clearly stated what precisely they should have done, but it is said that they should have done one of two things—they should either have called a meeting of the company to ask the opinion of the shareholders on the subject, or should have declined to complete the object for which the company was originally formed, for that the knowledge they had acquired must have shown them that the intention of all parties in entering into the speculation was one that must entirely fail in its effect, owing to the character of the business and the disastrous condition in which it was found to be. That is really the question that has been raised, and one has to see how, on the face of the bill, it can be held that Mr. *Gibb*, the deceased director, who engaged in this purchase, has made himself answerable for completing it under the circumstances stated in the bill.

Now I begin by saying (as I did in the Court below, and as the Vice-Chancellor did) that it is clear upon this bill, and that, I think, is beyond dispute, that Mr. *Gibb* is not charged with any malfeasance in the shape of corrupt malfeasance. He is not charged with having appropriated to himself any portion of the money of the shareholders, or with having had any indirect benefit from the engagement he entered into. He had nothing to do with the original firm. He was exactly in the position of every other shareholder as to the hope of advantage, or apprehension of possible disadvantage, that might be expected to accrue from making the purchase; and he had, in that respect, an unbiassed mind and judgment. Farther than that, the Vice-Chancellor stated (in which I entirely agree with him) that these gentlemen, Mr. *Gibb* and the other directors, for all that appears on the face of the bill, simply acted in the execution of what they believed to be their duty, however mistaken they may now appear to have been in the view they took. That is,

of course, a very great step towards the solution of the question one has to investigate; because the question is then simply 487] reduced to this,— whether or not the directors *exceeded the powers entrusted to them, or whether if they did not so exceed their powers they were cognisant of circumstances of such a character, so plain, so manifest, and so simple of appreciation, that no men with any ordinary degree of prudence, acting on their own behalf, would have entered into such a transaction as they entered into? Was there *crassa negligentia* on their part which, though not charged in words, is, it is argued, shown by the facts, so that they should be fixed with the loss of the fund entrusted to their hands for the purpose of making the acquisition of the business; was the acquiring of that subject-matter, through the medium of those funds, with the amount of knowledge which the directors had attained, an instance of *crassa negligentia*?

Now the case as to their power stands thus:— The power is given by the 84th section of the articles of association in very plain and explicit terms, and it is of a very large character. We must bear in mind that the object was to purchase this business. That was the sole creative cause of the existence of the company. If it had not been for the purchase of this business the company would never have existed. The articles of association go on to say, “The directors are authorized to purchase or acquire upon such terms and under such stipulations as to guaranty or otherwise, as may be agreed upon, the business of *Overend, Gurney, & Co.*, as it now stands.”

Now a larger power can hardly be conceived than that which is thus entrusted to these directors. The expressions “as to guaranty or otherwise,” and “the business of *Overend, Gurney & Co.*, as it now stands,” put together, convey to my mind the impression that it was meant to purchase the whole thing, including all assets and including all liabilities, and for this reason, that it was not likely that the firm would hand over all its assets if the new company taking all the assets did not also undertake the liabilities; because otherwise the partners would be in the condition of intrusting to others the management of their assets, which assets of course must be the source for the payment of the liabilities. But the parties proceed to purchase the good will of the business as it now stands, with this stipu-

lation also, that the directors are to make such arrangements as they think fit "in respect to guaranty or otherwise." The whole bearing of this contract of *purchase appears to [488 me to be this: you take the whole concern exactly as it is. In all these concerns there must be that amount of speculation which may require a guaranty. The purchase of any business whatever always consists in your taking the assets of the concern at an amount which is an estimate. The assets cannot be realized, of course, as to their value, except by actual sale. And we all know that in actual business that is an impossibility, because it must break up the concern, and then it would be no longer a going concern. Therefore, you must have estimates of the assets, which may prove insufficient. Lest the assets should prove insufficient for the liabilities, you may want a guaranty. Whatever may be the state of the concern, although it may be apparently flourishing, it is equally certain that you will want a guaranty of the value of certain things which can only admit of being taken at an estimated value. I think the expression "guaranty," which we find here, implies in ordinary parlance rather a personal guaranty than the taking of any security. Those who know anything of these concerns, know that it is not common to give more on the transfer of a business with reference to the value of the property disposed of than a personal guaranty; and the expression "guaranty" is much more ordinarily applied to a personal guaranty than to securities by way of a transfer of property, either land or chattels, or other securities for property.

Now these gentlemen, the directors, having that authority, it does appear to me that all that they did was perfectly within the limits of their power when they purchased the whole business, including all the liabilities and assets, and when they took, as a guaranty of the value of the assets, such security as they did take by that second deed which is in question in this case. It still remains to be seen whether or not there was *crassa negligentia* in so exercising their power; but that they had that power appears to me beyond dispute. I think if anything were wanting on that subject, it is not anything as to their authority; and as regards the company now coming forward to complain, it was announced that this had been done, which I conceive the directors had power and authority to do, namely, that they had

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taken over the business, and that there was a deed in existence, the deed of covenant, which could be seen. It was also stated 489] in the prospectus *(which emanated from the directors, as the company, and was, in fact, in that sense, the act of the company itself when so issued) that the company was formed, as even the deed of association itself shows, for the purchase of this business, and that it was to carry out an arrangement which, it was stated in the prospectus, had been made for the purpose.

It is possible, and Mr. *Colton* is entitled to put it so, that the true history of the transaction, as derived, of course, from the bill, which is our only source of information, is this:—Some arrangement or other was talked over and entered into between those parties who afterwards formed the company. But if so, it is not asserted that any variation from that arrangement was ever come to. But it is said what was done was not the act of the company: it was done before the company existed. That is a truism. It could not be the act of a nonentity. But the company was formed for the purpose of carrying into effect that arrangement, whatever it was. Mr. *Colton* says that he does not mean to say that there was any departure from the original arrangement between the first formation of the company and the issuing of the prospectus and the subsequent execution of the deed. Mr. *Colton's* argument is correct in this point of view, that until the execution of that deed by the directors, of course the company itself was not bound. There was what you may call a *locus pœnitentiæ*, if any *pœnitentiæ* was necessary. The directors could have withheld their assent at the expense and cost of breaking up the company, because the company was formed for this one purpose, and this one purpose only. But that is the extent of the mischief, if any mischief there was, which these directors did, namely, that they carried into effect that which had been (before the company existed) arranged and settled amongst the persons who afterwards formed the company. The directors carried into effect the intention of the company when it was formed, but with the knowledge of facts which are stated in the bill for the purpose of showing that there was *crassa negligentia* in pursuing that course after the facts had been ascertained. We are not told when those facts were ascertained; we are left in the dark as to that circumstance, which is rather remarkable in a bill of this character. It is stated in the intro-

ductory part of the bill that these facts had occurred with *reference to this flourishing concern, considered by every- [490 body to be a flourishing concern when this company was formed. It is stated in the bill that anterior to the company being formed in 1865, namely, in 1857, a course of somewhat reckless credit had been given to a number of concerns which did not merit such credit, and that thereby a heavy amount of debt had accrued, amounting, I think, at that time to the very large sum of between two and three millions of money, for which the security was very inadequate; that consequently the partners had become alarmed; that in 1861 the partners of the firm, on an investigation of their concerns, found that matters were not in a satisfactory plight, and they called one of the partners, who had hitherto not attended to business, up to *London*, and that he continued to give his superintendence to the concern, though we are not exactly informed what the effect of that superintendence was—whether it diminished the amount of bad debt or not; we must assume that it did not increase it, but things went on in the manner in which they had been going on from 1857—at the worst no increase, at the best possibly not much diminution of the evil which existed in 1857, and that went on until 1865, down to the time of this purchase being made.

Now I will only make one remark upon it, which is this, that in 1865, notwithstanding this amount of debt, the firm was still in high credit, and was believed to be a highly flourishing concern; and that is stated in the bill as among the reasons for the desire to purchase the business. Therefore, although there existed this large amount of ill-secured debts (it does not appear to be absolutely unsecured), still the concern was not broken up by it, nor had its credit been breathed upon, nor was it in any degree damaged with regard thereto, but it went on as a flourishing concern. We are not told that any farther foolish debts of this kind were contracted during that interval, but the result of their having been previously contracted was that in 1865, when the matter came to be investigated, it was seen (as it is averred) that the concern, if it had at that moment stopped, would have found its liabilities exceed by two millions the extent of its assets. I had forgotten that it is distinctly charged, but it is charged in a subsequent paragraph of the bill (considerably after these paragraphs *that relate to the extent [491

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of the debt) that this state of excess of liabilities over assets was known to the directors, the Defendants, including Mr. Gibb. It is not distinctly stated in the bill when or how it became known; but I will assume for the present purpose that they knew it before they put the seal of the company to the deeds in question. What they would then know would be that, in consequence of arrangements which had been entered into, by trusting persons who ought not to be trusted, this concern, although still believed to be a highly flourishing concern, in so far as the outside public was concerned, was not, at that moment, if there had been a break up of it, in a condition, from the assets of the firm, to pay all its debts. As to the property of the partners, there is nothing said about that. We are not told anywhere in the bill what amount of property the partners might or might not have, with reference to the value or importance of any guaranty that might be given by them. We are not told anywhere what was the amount of income arising from this business. We are not told anywhere that in reality the sum given for this business was too much. Half a million was given for the goodwill. It is not averred in express words that that half million was too much; we are left to infer it from the facts stated, if that is the legitimate inference from them. But I do not apprehend that it is a necessary inference that because, eight years before the purchase, there had been a degree of imprudence in contracting debt which was still weighing upon the concern, the price that was paid for the concern was a great deal too much. There is nothing on the face of the bill to show that by good management, and by introducing new blood into the concern, and a large amount of capital to start the concern afresh, free from any difficulties which might press upon it at the commencement, and by managing it in a better way hereafter, and by taking care (on which some reliance was placed in the prospectus) to have a careful set of managers, and by taking prudent precautions in future with reference to the management, the concern might not have been made a flourishing and successful one. There is no averment in the bill that the price paid for the purchase was far beyond the actual value of the concern as a going concern at that moment, nor is there anything that necessarily leads to the inference that so it must have been.

492] *The way in which that inference is attempted to be raised is this:—They say, you, the Defendants, took two deeds; you took, first, the deed by which the whole concern was handed over *minus* such assets as the purchasers might be willing to omit from those they intended to take over. And in the second deed you rejected the management and control of assets, which you said you would not take over, to the nominal amount of four millions. And with respect to these this arrangement was made: The partners of the old firm were to consider those assets as being subject to their control and management; they were to have the getting of them in, and as they got them in or as they got any of them in, they were to pay them over. It must be taken from the statements in the bill that the partners were not likely to get in more than a portion of these assets, but no definite portion is mentioned; it is only said that many of the supposed assets were uncertain and without value; but whatever was to be got in, time was to be given for getting it in, two and a half years. That is the nature of the deed. In the first deed the guaranty is given which is spoken of in the second deed, a personal guaranty on the part of the partners with reference to the liabilities not exceeding the assets. The partners of the old firm took upon themselves the getting in of those assets, which were exposed to the difficulty I have spoken of, and when they were got in they were to be paid over to the directors of the company. Farther than that, there was this security given; the whole of the £500,000 was to be dealt with half as money and half as shares. I need not go through the detail of it, but the effect of it was that the £500,000 were not to be paid during the currency of this liability, not to be paid till it should be ascertained whether or not the guaranty was required. Farther than that, provision was also made that the capital of the partners of the old firm as it stood in the books, as a matter of figures, and as a matter of ciphering, amounting to something exceeding a million of money, was to be considered as a thing not to be dealt with as having any existence (if I may use that expression) until the liability should be found not to exceed the assets. They were not to make any claim in respect of that capital until that period should have arrived.

My Lords, these are the facts from which we are asked to infer *that there was *crassa negligencia* on the part of these [493

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gentlemen in taking any part or concern in this business whatsoever. Now it appears to me that such an inference is utterly inconsistent with the statements made in this bill, which does not aver any act of misconduct beyond that of imprudence (if the imprudence be shown by the facts there stated) from which *crassa negligentia* can be inferred. It appears to me, that there being in this bill no allegation beyond these mere bare facts which I have stated, there is no allegation sufficient to charge these gentlemen with such an amount of imprudence in engaging in a concern for their own benefit as well as for the benefit of the rest of the shareholders, as to make them responsible for the loss which has occurred. I think it must be taken (as it is put in the judgment of the Vice-Chancellor), by fair inferences from the statements in the bill, not quarrelled with by the argument of the counsel for the Appellant, that the whole of these directors were acting in the belief that they were discharging their duty. In the facts stated in the bill, for the purpose of giving an exposition of the ruinous character of this purchase in its result, I cannot find a sufficient statement that that ruinous character was so apparent at the time when the purchase was made that it would justify your Lordships in coming to the conclusion that the parties making it, and having full power to make it, acted with such *crassa negligentia* that they can be made responsible for all the loss which has resulted from it. It appears to me that it is quite possible, according to the facts stated in this bill that all might have gone on well. It appears quite possible that out of those assets of four millions something might have been realized — how much, it is impossible, on the statements of the bill, to come to any conclusion upon either one way or the other — except for intervening circumstances which could not be foreseen or controlled; it was quite possible that that concern which from the year 1857, with that amount of bad debt, had gone on nevertheless keeping up a prosperous and extensive reputation in the world, down to 1865, namely, eight years, might have been so relieved from the pressure of those debts by the introduction of fresh capital, which would stave off any immediate possibility of heavy claims falling on the firms without the means of meeting them; and that during the term (of two and a half years), 494] which *was provided by the second deed, the business

might have been carried on with the same amount of prosperity as it had enjoyed up to that time as far as regarded the general reputation which the concern enjoyed, and that by the time of the expiration of that period of two and a half years, such a proportion of the doubtful and bad debts might have been got in, and such a proportion might have been contributed by the then apparently (as far as we have any information in the bill) solvent proprietors of the old concern, in respect of their guaranty, as might have made the whole concern (which if once clear of the weight of debt was manifestly a prosperous one) go on in the same prosperous course as it had previously pursued, as far as regards its reputation.

My Lords, I cannot say, in that state of circumstances, that I see that anything has happened, according to the statements in this bill, which would justify your Lordships in coming to the conclusion that the directors, acting in good faith, although imprudently, acted with such an amount of clear and gross negligence as to justify the proprietors in saying, — that which you have done for us we reject, that which you have done, acting on our behalf, we say has not been done according to those principles which any agent authorized for the purpose of perfecting a purchase for those who trust him with their money ought to act upon, and therefore we will reject the purchase and fix you with the liability, and ask you to replace our funds.

It is perhaps hardly necessary to say it, after the explanation I have already given, but I should like to say one word as regards the case of *Turquand* and *Marshall* ⁽¹⁾, which was cited by Sir *Roundell Palmer* yesterday, and referred to by Mr. *Cotton* this morning. I certainly never intended to lay down the strong proposition that a person acting for another as his agent, is not bound to use all the ordinary prudence that can be properly and legitimately expected from any person in the conduct of the affairs of the world, namely, the same amount of prudence which, in the same circumstances, he would exercise on his own behalf. What I did intend to state in that case was, that I could not measure — and I think it would be a very fatal error in the verdict of any Court of justice to attempt to measure — the amount of prudence

(1) Law Rep., 4 Ch. Ap., 876.

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495] *that ought to be exercised by the amount of prudence which the judge himself might think, under similar circumstances, he should have exercised. I think it extremely likely that many a judge, or many a person versed by long experience in the affairs of mankind, as conducted in the mercantile world, will know that there is a great deal more trust, a great deal more speculation, and a great deal more readiness to confide in the probabilities of things, with regard to success in mercantile transactions, than there is on the part of those whose habits of life are entirely of a different character. It would be extremely wrong to import into the consideration of the case of a person acting as a mercantile agent in the purchase of a business concern, those principles of extreme caution which might dictate the course of one who is not at all inclined to invest his property in any ventures of such a hazardous character. As I said on the former occasion, so I think now, that this purchase of the concern of *Overend, Gurney, & Co.* must have been a speculative purchase; it was the purchase of a business which must have been known to be exposed to hazard. Men were chosen by the company as their directors, to act on their behalf in the same manner as they would have acted on their own behalf as men of the world, and accustomed to business, and accustomed to speculation, and having a knowledge of business of this character. If we had found any statement in the bill charging distinctly any improper motive or any undue neglect of any circumstance or transaction which ought to have been inquired into by the persons making this purchase, the case would of course have been different—but I do not find a single intimation, from the beginning to the end of the bill, of anything being left undone that ought to have been done by these trustees. On the contrary, the charge is this, and simply this—and therefore all that is cast upon us, as it appears to me, on the present occasion is to ascertain what the result of these facts is—the simple fact is that they did ascertain every fact that was to be ascertained, every fact that was known to other persons was ascertained by these trustees, and the charge is this: it is said, you, the trustees, having ascertained those facts, were placed, by the mere circumstance of your having so ascertained them, in a position in which you ought to have broken up the company, or at least to 496] have told the company that *the transaction was one in

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which you must require farther advice on farther powers. I cannot at all agree with that proposition, and I certainly think now, after this second able argument, that no case is made out against Mr. *Gibb*, in which he, or his executor, could be called upon to refund any portion of the moneys which have been lost. I therefore think the proper course will be to dismiss this appeal with costs.

LORD CHELMSFORD :

My Lords, at the close of the argument on the part of the Appellant I entertained no doubt that the decree of my noble and learned friend ought to be affirmed ; but the case being one of importance, and certainly of novelty, I am glad that your Lordships proposed to have the case fully argued before you pronounced a decision.

To my mind the suit is one of a very extraordinary character. The short statement of it is this : It is a bill filed by a company incorporated for the express purpose of purchasing and carrying on the business of *Overend, Gurney, & Co.* against the directors, for having done the act for which the company was formed, and which they were authorized to do. Now there is no charge in the bill of any fraudulent conduct on the part of the directors, or of any breach of duty, or of any negligence, or of their not having honestly done what they considered to be their duty towards the company, the existing shareholders, and those who might become so. Then what is the ground upon which they are sought to be made liable for all the loss which has been sustained in consequence of the failure of the company a short time after it was incorporated ? As I understand it, it is this : It is alleged that the directors were trustees for the company, and that in purchasing this business they did an act so improvident and imprudent that it amounted to what is called *crassa negligentia*, and consequently to a breach of trust.

Now there is not in the bill any allegation of negligence, but there is a statement of facts which, of course, are admitted by the demurrer for the purpose of the day, and from those facts a Court of Equity is required to draw certain conclusions which are to make the directors liable for this act of purchase. The [497] bill states that *the business of *Overend, Gurney, & Co.* had been carried on for many years ; that the firm had a high com-

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mercial reputation, and that the business in general was considered to be extremely flourishing. In the year 1857 certain losses were incurred by the firm, and in the year 1861 there were certain accounts and debts outstanding, and also certain investments of a rather questionable character, which created alarm in the minds of the partners; and it appears from the statements in the bill that the firm was insolvent to the extent of £2,000,000. Now I agree with my noble and learned friend, that, with regard to that allegation of the insolvency of the firm, it would merely mean this: that if they had been called upon at the time immediately to satisfy liabilities to that extent, they probably would have been unable to meet their engagements. But there is nothing to show that the company, continuing to carry on the business, might not in the course of time, have liquidated that deficiency. Notwithstanding this state of things the partners did go on; they did carry on their business, and, as far as we can perceive, they carried it on with undiminished credit and reputation down to the year 1865. In that year, the month of June, 1865, a scheme was suggested for forming a joint stock company, which company, when established, was to purchase the business of *Overend, Gurney, & Co.* The company was formed on the 12th of July, 1865, by means of a memorandum and articles of association, which were duly registered according to the Act of Parliament.

Now at that time (and this is a very important circumstance) the state of affairs of the firm of *Overend, Gurney, & Co.* was fully known to all the parties who engaged in forming this joint stock company. There is a statement in the bill, which was not necessary, for the purpose of showing that the partners of the firm knew perfectly well the state of their affairs; but by the 7th paragraph in the bill it appears that all persons who joined in the scheme, and who were not partners, were fully acquainted with the whole extent of the business and the condition of the business at that time. The 7th paragraph, describing what was arranged before the company was formed, says that it was arranged that certain accounts, amounting in the whole to upwards of four millions, and which in a great measure were regarded as bad investments or doubtful debts, 498] should not be *taken over by the proposed limited company, and should not be transferred into the books of the com-

pany; but a credit was to be opened in the books of the company, and the partners in *Overend, Gurney, & Co.* were to be debited with this sum of four millions, and they were to be credited with certain other sums; which would have the effect of making them debtors to the limited company only in respect of the sum of £2,910,181. Then it was arranged that the sums which might be recovered out of these outstanding debts should be applied in liquidation of this sum of £2,910,181. Therefore, the circumstances of the partners were fully known to all the persons who agreed to form this company.

Then, on looking to the memorandum of association we shall see what was the object for which that company was formed. It is there stated that the objects for which the company is established are, amongst other things, "generally the carrying on the business of bill brokers and money-dealers as heretofore carried on by Messrs. *Overend, Gurney, & Co.*, and with a view to the above objects the acquisition of such business upon terms to be agreed upon by the directors." Then in the articles of association, "the directors are authorized to purchase or acquire upon such terms and under such stipulations as to guaranty, or otherwise, as may be agreed upon, the business and goodwill of the said Messrs. *Overend, Gurney, & Co.* as the same now stands, and any other business of a like character which they may hereafter think it expedient to acquire for the benefit of the company."

I have no doubt whatever that the words "as the same now stands" must mean that the business is to be taken over with all its credits and liabilities, that is, as the business appeared in the books of the company. Accordingly, the Respondents, with the exception of Mr. *Samuel Gurney Buxton*, are appointed by the articles of association to be the directors with Mr. *Gibb*, the testator. All those persons, including Mr. *Buxton*, subscribed the memorandum of association and thereby became the company, and the only company at the time that prospectus was issued to which allusion has been frequently made, and which I shall have occasion to refer to presently.

The directors being thus empowered to purchase the business—to do that for which the company was incorporated—proceeded by *the deed of the 27th of July, 1865, to carry out the [499 arrangement which was originally made—they did that which

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they were authorized to do. It is not alleged that they were at all fraudulent in their conduct, or that there was any breach of duty, or that there was any negligence. But having done this act they are now to be charged with an enormous liability, to answer for all the losses which have been occasioned by the failure of the company in consequence of its being a most imprudent and improper act to purchase this business of *Overend, Gurney, & Co.*

My Lords, as it appears to me, the complaint or objection which ought to have been made goes still deeper than the carrying out of this purchase—it ought to have been to the formation of the company itself for the purpose of purchasing a concern which was a very hazardous one, and according to appearances, upon the face of the business certainly, was full of hazard and danger. But, however, that is not the charge in the bill. The bill states facts from which we are asked to draw the inference that there was negligence or misconduct on the part of the directors.

Now, my Lords, how is that made out according to the argument on the part of the Appellant? It is said that there was some discovery made by the directors before the execution of the deed of the 27th of July, 1865, by which they acquired a knowledge of the circumstances of the firm of *Overend, Gurney, & Co.* which should have induced them to decline the purchase, or at least to call a meeting of the shareholders to say whether they should carry out the intention for which the company was incorporated. I have already shown your Lordships that there was no discovery whatever made at any time between the original arrangement and the execution of the deed of July, 1865. I have shown your Lordships that from the very first, from the time the arrangement was entered into, all parties knew perfectly well what was the state of the affairs of *Overend, Gurney, & Co.*, and that therefore there can be no ground whatever for saying that anything occurred between that arrangement and the execution of the deed which should have made the trustees doubt and hesitate whether they ought to execute the authority which was entrusted to them.

My Lords, with regard to that deed of July, 1865, that was no
500] *doubt prepared originally—certainly at the time the prospectus was issued—because the public are informed by

that prospectus that the deed of covenant (which of course must mean the draft deed of covenant) might be seen at the office of the solicitors of the company. I do not quite agree with Mr. Cotton's view that the arrangement having been made, the arrangement was completed by the execution of that deed of the 27th of July, 1865. What was the arrangement? The arrangement was that a company was to be formed which should purchase the business of *Overend, Gurney, & Co.* Then the completion of that arrangement was the formation of the company, the incorporation of the company, and the power given to the directors by the memorandum of association and the articles of association to purchase this business. That completed all that the arrangement required. It invested the directors with the powers which were necessary for the purpose of enabling them to carry out the objects for which the company was incorporated.

Accordingly, that deed was executed. Now what is the ground upon which any *crassa negligentia* can be charged upon the directors, not for having executed that deed, but for carrying out the arrangement at all? There is no statement whatever that the business in fact was not worth the sum, the half million, which was given for it. Undoubtedly, as my noble and learned friend has said, the speculation was a hazardous one. I was rather surprised to hear it denied that the business of a bill broker was hazardous, but there can be no doubt whatever that it was a speculation which might answer or might not; but at all events it was one which the trustees were authorized to carry out by means of the purchase of the business. Now there is no allegation whatever that the business was of such a ruinous description (because that word has been used) that it was a most imprudent and improper act on the part of the trustees to go on with the arrangement. My Lords, it does not at all follow, because the business of *Overend, Gurney, & Co.*, presented a rather formidable aspect, that with the addition of five millions of capital, which was the capital of the company that was established, and by carrying on the business prudently and carefully, it might not have become a very flourishing concern.

There is another ground upon which it was said that the trustees acted improperly and negligently, and that was [501 with regard to the guaranty which was taken from the partners in the firm of *Overend, Gurney, & Co.* There is nothing to show

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that the directors were aware, or even could be aware, that the partners' income and property were not quite sufficient to secure the company against any losses which could have been incurred. But the guaranty was part of the original arrangement which the directors made; and it seemed to be, in the course of the argument, suggested that the directors first of all took a guaranty which would have provided for the immediate satisfaction of the different liabilities which they incurred by undertaking the business, and that afterwards they agreed by this deed to postpone the time. There is nothing of that kind shown on the bill; there is no such fact stated; and all that appears is that they took this guaranty, postponing the time in which it was to be available; and at the same time there is nothing to show that they did not get the very best terms which they could possibly get from the partners in the original firm.

Then, my Lords, something has been said with regard to the prospectus. I confess, according to my view—I may be wrong—but I thought that that prospectus has nothing whatever to do with the question here. If it had been a question between the directors and a shareholder, and the shareholder had alleged that there had been any misrepresentation in that prospectus, of course it would be a ground for relieving him from his being a shareholder at all. But even supposing that that prospectus contained any misrepresentations (there is no proof that it did so) it seems to me not to have any bearing upon this question, which depends, according to my view of it, entirely upon the powers which were given to the directors and the mode in which those powers were executed. Now by the memorandum of association stating the objects of the company, the powers given to the directors were “to purchase or acquire upon such terms and under such stipulations as to guaranty, or otherwise, as may be agreed upon, the business and goodwill of *Overend, Gurney, & Co.* as the same now stands.” They did that. They did it, it is admitted, honestly and fairly, and believing that they were doing it in the discharge of their duty, and it seems to me to be a very strong and unusual thing for a suit to be
502] now instituted to make the directors liable *for the loss which has occurred under these circumstances. In fact, it amounts to this: an agent (because these directors are really more in the character of agents than of trustees, they are man-

datories), an agent being authorized to do an act, which act is in itself an imprudent one, and which the principal ought never to have authorized to be done, is when the loss is occasioned by his having done the act, to be made liable for it. That certainly is rather a startling proposition, and one which it would require a great deal of argument to lead me to adopt. Under all the circumstances, I think it is perfectly clear that the decree of my noble and learned friend ought to be affirmed.

LORD WESTBURY:

My Lords, this is a bill filed by that abstract ideal legal existence called "the company," against the officers of the company, to make them answerable for a misuse of their powers. Now this suit has been referred to as being of rather a singular character, but one of its curiosities has not been noticed. From this bill you are unable to gather that there ever were any other members of this company than those who were concerned in the genesis thereof. There is, in truth, an allegation in the bill — which cannot be accepted as containing, by implication, the statement that there was another body of persons — I mean the allegation in the 14th paragraph, in which it is stated that the directors did something without any communication with the shareholders of this Plaintiff company. But whether there were any shareholders, except the directors themselves, you look through the bill with a vain endeavor to ascertain. Now the company, in a legal sense, comes into the world upon the registration of the memorandum and the articles of association; and the general character of the suit, putting aside what I have said, may be thus described. The company says, you, our officers, our directors, receive from these articles of association certain powers, and you have made a gross misuse of those powers, most imprudent and most ruinous; and by reason of this neglect on your part, this abandonment of all the rules of prudence, the capital of the company has been wasted in the acquisition of what has been an insolvent and a ruinous speculation. The theory, therefore, of the bill is this, that the company *gave to the directors these powers believing that [503 they were to use them in the acquisition of a solid, well-established, thriving concern; and that the company knew nothing of the state of the concern, but left that to the directors to as-

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certain, and that the directors concluded the purchase and applied the purchase-money, having ascertained that the thing was a dead loss, and therefore misused their powers. In that view of the character of the bill, independently of the argument which has been founded upon the extent of the powers given in the articles of association, and the argument that those powers warranted the use that was made of them, I wish particularly to draw your Lordships' attention to that which I vainly endeavored from time to time to impress upon the counsel at the Bar, namely, that the bill contains the clearest admission that the company, before the purchase was completed, knew perfectly the insolvent character of the concern which the company was in point of fact embodied to acquire, which the directors undertook the duty and office of acquiring, and which they were empowered to do by the persons now complaining of them for using the powers given to them for the purpose. It would be preposterous to hold that a company, or any other creature, can complain of a thing being done the nature of which was previously well known, and was fully authorized. The object of the purchase was well known to these persons before the purchase was made, and known to them, in fact, at the very time when they created powers and authorities for the purpose of doing that which was afterwards done.

I have said that the company came into existence upon the registration of the memorandum and articles of association; but the memorandum and the articles of association were created for the very purpose of acquiring this business; and when they were created, when the company was begotten (if I may so use the phrase) it was by persons who were perfectly well aware of all that existed at the time, and of all that was subsequently found to be in existence; and they created this company for the purpose of doing the very thing which was done. The vice that has occurred was in the very creation of the company, the evil that is complained of was the very thing for the purpose of accomplishing which the company was
504] created and called into existence. Or if you do not *put it so high, yet the thing that was done was done under powers given by the company with a perfect knowledge of the real state of that subject matter of property which the powers given to the directors were to be used for the purpose of acquiring.

The company coming into existence on the registration of the memorandum of association, the bill tells us, without any word of complaint, that immediately after the registration, that is immediately after the formation of the company, which formation includes the appointment of the directors, a prospectus which had been prepared by the intended directors with the privity and assistance of other parties, was issued by the intended directors for the purpose of establishing the company. That was to be the very basis on which the company was to be built. It was an announcement by the company to the world, through the medium of the only persons by whom the company could act, and by whom it is represented as acting, in this manner without one word of complaint, that the company was formed and intended to be used as the means of acquiring this business, and taking it over with all its assets and with all its liabilities. And in so doing these persons did not take a leap in the dark, because at the end of the prospectus they tell the world (and what they tell the world they must have known themselves) that a copy of the memorandum and the articles of association (instruments of their own creation) as well as of the deed of covenant in relation to the transfer of the business, can be inspected by the world at the offices of the company. Is it too much, then, to attribute to the company a personal legal knowledge of that which they, who formed the company, tell the world may be acquired at their offices? Undoubtedly it is not. You must attribute to them, from the first, a knowledge of the state of this business, and a deliberate intention to acquire the business through the medium of the formation of the company, notwithstanding what was apparent to everybody, on the inspection of that deed of covenant, that the acquisition of the business would be attended with the incurring of an enormous amount of debt, and also with the acquisition of a large amount of assets, of a most perilous and hazardous description, to meet that debt.

Now, my Lords, we go a little farther. There was a subordinate portion of this complaint, and I will put it in the abstract, and *as clearly as I can. It consisted of this: In carry- [505
ing out this purchase, say these complainants, you did not, in point of fact, adhere to the general condition of your authority that you were to take over all the assets and all the liabilities;

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for you left a great portion of the assets in the hands of the partners of the old firm, with power to collect them, and thereby diminished your security in the transfer of the business to yourselves. Now that is hardly made, as it ought to have been made, the subject of distinct complaint, and in the words in which I have clothed it I have given it a much greater distinctness, I conceive, than anything that can be found in this bill. But the answer to it is obvious; supposing you have no right of complaint, which I assume you have not from the observations I have already made, this subordinate part of the complaint must first be dealt with, rejecting the main complaint, which is a complaint of the acquisition of the business at all. But now, if it is admitted that the directors had the power to acquire the business, then we come to the contingent powers that were given to them by the articles of association, and those are, clearly, that they were to acquire the business "upon such terms and under such stipulations, as to guaranty or otherwise, as may be agreed upon." Now this subordinate point of the complaint clearly comes within those words; because, although the assets are left to a certain extent under the control of the old partners, it is with the accompaniment of a variety of stipulations, securing to the new company the real benefit of the transaction, and superadding this condition, that there shall be an absolute guaranty binding the personal estate of the old partners to the extent of the whole amount of the liabilities *plus* the assets that shall be realized. It is impossible to make that a subject of complaint, unless the original transaction itself admits of being set aside.

But now, again, comes another head of complaint, which really can hardly be seriously dealt with, say the objectors to the decree of the Lord Chancellor, "Why, it might have been within your power to do all this, but when you found the insolvent state of the concern—that is, when you found that which we, the company, the complainers against you, previously well knew—you ought not to have carried this contract into effect 506] without coming back *to us, the company, who had plainly told you that we knew the whole, and yet sent you forth with authority to complete the transaction."

Then comes a ludicrous suggestion: You should have called a public meeting of the shareholders—there being no allega-

tion in the bill that there were any—and you should have submitted to those shareholders the condition of things and asked the shareholders to tell you whether you were to go on, or whether they would give you supplementary powers to complete that which you had been previously directed to do. But, my Lords, if the first part of the case is right, namely, that they were told to acquire this business, and told to acquire it notwithstanding all that appeared upon that deed of covenant, the recurrence to a public meeting, which in reality could do nothing to alter the original constitution, intent, and object of the company, is a mere ludicrous thing.

I must just advert only to another thing, which gives one the greater satisfaction in dismissing this bill, and it is this: that throughout the bill, from the beginning to the end, we are left without the smallest information upon that point which is the cardinal point in the whole case, namely, the value of the business. It is of no use to tell me that the liabilities of the business were two millions, while the annual profits of the business might have been themselves nearly a million a year. And when you talk of the liabilities, and of the price to be paid for the business as a ruinous price, you must first tell me, before I can agree with you as to the ruinous character of the speculation, what was the nature of the business itself, and what, if it had been well managed and confined to its original purpose, might have been for the future, after the time when this company was formed, the legitimate amount of the profits resulting from that business.

My Lords, I cannot therefore abstain from expressing my satisfaction at finding that the view taken by the Vice-Chancellor was not a view warranted by a real knowledge of the facts of this case, and that his decision was properly reversed by the Lord Chancellor; and I hope that your Lordships will confirm the decree of the Lord Chancellor, and dismiss this appeal with costs.

*LORD COLONSAY :

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My Lords, I have had no difficulty in arriving at the same conclusion. It appears to me that, assuming the facts set forth in this bill to be the real and actual facts of the case, they do not, by any fair and reasonable inference that can be drawn from them, support the conclusion that was aimed at, that is to say,

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the prayer of this bill. And, for the reasons which have been stated by my noble and learned friends who have preceded me, I agree in the opinion that this appeal should be dismissed with costs. I think it unnecessary to repeat those reasons, which are quite satisfactory to my mind.

Order appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, 12th April, 1872.

Solicitors for the Appellant Company: *Maynard & Son*.

Solicitors for the Respondents: *Upton, Johnson, Upton, & Budd*.

See 1 Eng. Rep., 567, and 611 note: *The New Brunswick, etc., v. Muggeridge*, 1 Drewry & Smale, 363.

Directors of a corporation are only liable for abuse of their powers as such, where they have clearly abused them.

Bach v. Pacific Mail, 12 Abb., N. S., 373, 377; *Wright v. Oroville M. Co.*, 40 Cal., 20; *Spering v. Smith*, 5 Am. Law Times Rep., 325; Penn. Sup. Ct., *Hoffman v. Van Nostrand*, 42 Barb., 174.

Unless they are guilty of such abuse, a stockholder has no right to restrain their action by injunction.

Bach v. Pacific Mail, 12 Abb., N. S., 373, 377.

Although a court of equity will restrain directors from doing an act even within the scope of their corporate powers, if such acts would amount to a breach of the trust upon which the authority was conferred.

Wright v. Oroville M. Co., 40 Cal., 20. *Spering v. Smith*, 5 Am. Law Times Rep., 327, and cases cited.

One stockholder, in behalf of himself and all others similarly interested, may maintain an action against the directors and treasurer of the corporation to prevent the payment of an illegal claim,

Butts v. Wood, 37 N. Y., 819; Kerr on Inj., 548, 558; *Hichens v. Congreve*, 4 Russell, 562 and note, p. 577 (Banks's ed.); *Walker v. Devereaux*, 4 Paige, 229; *Gray v. Chaplin*, 2 Sim. & Stu., 267; *Dodge v. Woolsey*, 18 How. (U. S.),

321; *Samuel v. Holiday*, Woolw. C. C., 400; *Bagshaw v. Eastern, etc.*, 2 MacN. & G., 389; but see *Taunton v. Royal Ins. Co.*, 2 Hem. & Miller, 135.

The plaintiff, in such a case, must show how he derived title to his stock.

Walburn v. Ingilby, 1 Myl. & Keen, 61.

So a creditor of a mutual insurance company may maintain a bill in equity against the officers of the company who, having funds of the company in their hands to pay the plaintiff's claim on the company for a loss, have neglected and refused to pay it, and fraudulently applied the funds to other purposes. But the company is a necessary party.

(*Lyman v. Bonney*, 101 Mass., 562). A stockholder may prevent the using of a subscription for any, except the purposes for which it was raised.

Bagshaw v. Eastern, etc., 2 MacN. & G., 389, and cases in note to Little, Brown & Co.'s ed.

Though the action be in form in behalf of all the stockholders, it may be maintained notwithstanding the plaintiff be the only stockholder who insists upon the relief, *White v. Curmathen*, 1 Hem. & Miller, 786. The power of directors of a corporation and the right of a stockholder to restrain their action are fully considered in *Bradley v. Ballard*, 55 Illinois, 413; and in *Marsina v. Golthwaite*, 34 Texas, 125.

[Law Reports, 5 House of Lords, 508.]

April 16, 18, 1872.

*WILLIAM WOTHERSPOON and another, Appellants; [508
AND
JOHN CURRIE, Respondent.

Trade name — Injunction.

In order to constitute a ground for interference by a Court of Equity to protect a manufacturer against the use, by another person, of the particular name of his manufactured article, it is not necessary that there should be a *mala mens* towards the first purchaser of the article thus imitatively designated. The fault of the imitator is, that the first purchaser may be enabled through this unwarranted designation to retail a simulated article at a lower price than would be demanded for the original article, and so the original manufacturer may be injured.

Where a trade mark is not actually copied, the existence of a fraudulent intention is a necessary element in the consideration of a case of this description. The party complained of must be proved to have done the act with the fraudulent design of passing off his own goods as those of the Plaintiff. It is not necessary, however, to show an exact resemblance between the original and the counterfeit — it is sufficient if there is such a resemblance as will mislead an unwary purchaser.

A name may become a trade denomination, and as such the property of a particular person who first gives it to a particular article of manufacture. The employment of the name by another person for the purpose of describing an imitation of that article, is an invasion of the right of the original manufacturer, who is entitled to protection by injunction,

In this case a bill had been filed to restrain *Currie* from using the name “*Glenfield*” in connection with starch manufactured by him, such name being claimed by the Appellants as exclusively belonging to the starch manufactured by themselves.

Messrs. *J. & W. Fulton & Co.*, had formerly carried on the business of starch makers at *Glenfield*, near *Paisley*. They manufactured a species of powder starch from sago, and gave it the name of “*Glenfield Double Refined Powder Starch*,” by which name it became well known to the public. In 1847, the Appellants purchased the business from them, and with the business the plant and stock at *Glenfield*. One of the clauses in the agreement of purchase was contained in a letter from *W. Fulton* to *W. Wotherspoon*, which was in these words: “That you have the sole right *of using the words ‘*Glenfield Double Refined*’ [509

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Powder Starch, and that I will retire from the business of starch making entirely." For some years the Appellants carried on the business of making starch at *Glenfield* itself, but that business increasing very considerably, they removed the works to another and more commodious place, also situated near *Paisley*, called *Maxwelltown*, where they had larger premises, which became known as the "*Glenfield Starch Works*." The article itself was commonly known as "*Glenfield Starch*."

The Respondent *Currie* was a starch and corn flour manufacturer, carrying on his works at *Paisley*; his place of residence had been for many years at *Glenfield*, during the whole of the time that the starch works of *Fulton*, and afterwards of the Appellants, had been carried on there. In 1868, there was some arrangement between the younger *Fulton*, the son of the former proprietor, and *Currie*, by which *Currie* obtained possession of a small part of *Fulton's* premises at *Glenfield*, and began making starch there. In 1869, the Appellants discovered that starch manufactured by the Respondent had been sold by him as manufactured by "*Currie & Co.*," but with the words "*Glenfield Starch*" printed on the sale labels. They accordingly took proceedings against him in the Court of Session, and obtained an interdict prohibiting him from using the description "*Glenfield Starch*" affixed to any packets of starch sold by him in *Scotland*. They afterwards found that starch manufactured by the Respondent was sold by him under that special description in *England*, and they filed a bill in Chancery against him to restrain him from so describing his manufacture. In the affidavit of the Respondent, filed in answer, he stated that he had resided in *Glenfield* for the last twenty-four years; that that fact, and the excellence of the water there for the manufacture of starch, and the cheapness of labor there, had induced him to set up his manufactory in that place. *Glenfield* was in fact an open place, with some cottages, not enough to constitute even a village, and with a factory where this business was carried on, and it was admitted that the water there was excellently suited for the purpose. The starch appeared to have been put up in packets somewhat resembling those of the Appellants; but the 510] ground of *complaint in the bill was as to the labels; the material parts alleged as in violation of the Appellants' rights were the . . .

The Appellants' labels were in this form :

“ GLENFIELD
PATENT DOUBLE-REFINED POWDER
STARCH,
Exclusively Used in the Royal Laundry,
AWARDED THE PRIZE MEDAL, 1862.

Manufactured by ROBERT WOTHERSPOON & Co., Great Wellington Street
Kinning Park, (and 70, Union Street), Glasgow.
London Depot — WOTHERSPOON & Co., 66, Queen Street, City.”

The Respondent's labels were in this form :

“ THE ROYAL PALACE
DOUBLE REFINED
PATENT POWDER STARCH.

CURRIE & CO.,
STARCH AND CORN FLOUR MANUFACTURERS,
GLENFIELD.”

A great many affidavits were filed on both sides, and, among other things, it was proved that the Defendant's starch was sold to wholesale dealers at a somewhat less price than was paid for that of the Plaintiffs.

The motion for an injunction came on before Vice-Chancellor *Malins*, who, on the 25th of February, 1870, made the order as prayed. On appeal, Lord Justice *James*, upon the 5th of July, 1870, discharged the order for an injunction. The motion for a decree then came on to be heard before Vice-Chancellor *Malins*, who acting, as he conceived himself bound to do, on the authority of Lord Justice *James*' decision in the matter of law, dismissed the Plaintiffs' bill; but, adhering to his own opinion on the facts, dismissed it without costs. This appeal was then brought.

Sir *R. Palmer*, Q.C., and Mr. *Fletcher*, for the Appellants :

The principles which have governed the decision of the Court of Session in this case ought to have governed that of the Court of Chancery. The particular name of “*Glenfield*” which 511 distinguishes this from all other kinds of starch, has been

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wrongfully usurped by the Respondent. That name is, in fact, the trade mark of the Appellants' business, and cannot be adopted and used as such by another person without an infringement of their rights.

[*Edelsten v. Vick* (¹), *Croft v. Day* (²), *Morison v. Moat* (³), *Shrimpton v. Laight* (⁴), *Edelsten v. Edelsten* (⁵), *The Leather Cloth Company v. The American Cloth Company* (⁶), *Millington v. Fox* (⁷), *Perry v. Truefitt* (⁸), and *Rodgers v. Nowill* (⁹) were cited.]

Mr. Cotton, Q.C., and Mr. *Freeling*, for the Respondent :

The name of *Glenfield* is that of the place where the Respondent actually resides, and where he has resided for many years. There can be nothing wrong in his using the name of his own residence, and which is, as it is in this case, the place where the starch is actually made. By attempting to appropriate the name of the place where the Appellants formerly made the starch but where they no longer make it, they cannot exclude all other persons, especially those who reside in the place and carry on their manufacture there, from employing it. The Appellants' starch is, in fact, no longer *Glenfield* starch ; it is not made at that place, and it has lost the benefit of the peculiarity of the water there, which is asserted and admitted to be of a quality valuable for manufacturing it. The cases cited do not apply. In all of them there was a colorable imitation of the article manufactured — here there is none. There is no misrepresentation, nor any fraud, and the name on the Respondent's label is not in any manner connected with the description of the starch manufactured by him, and, used as it is on these labels, cannot mislead any one. The Court will not, without the pretence of either colorable imitation in the article, or fraudulent misrepresentation, whether as to the place of its manufacture or anything else, deprive a manufacturer of the 512 use of the *name of the place where he actually resides and makes the article which he sells.

At the conclusion of the respondent's case,

(¹) 11 Hare, 78-85.

(²) 7 Beav., 84.

(³) 9 Hare, 241.

(⁴) 18 Beav., 164.

(⁵) 1 De G. J. & S., 185.

(⁶) 11 H. L. C., 523.

(⁷) 3 My. & Cr., 338.

(⁸) 6 Beav. 66.

(⁹) 6 Hare, 325.

THE LORD CHANCELLOR (Lord *Hatherley*), after stating the nature of the case, said:

I think the principles governing these cases have been so well settled by a long series of decisions that the only difficulty which exists in a case of this kind is to apply those principles to the particular facts before us. I think the authorities entirely bear out the case of the Appellants as one entitling them to a remedy, when the facts are understood. There are certain facts which are quite beyond dispute, but I will not enter upon a large mass of evidence which must all be fresh in your Lordships' minds. I think the selection of one or two points will be quite sufficient to show upon what principles, as far as I express my opinion in this matter, the conclusion has been come to.

The Respondent having a brother in this business, and finding that there was a considerable sale of starch under the name of "*Glenfield Starch*," conceived the idea of becoming himself a starch manufacturer, and applied to Mr. *Fulton* to let him occupy a small portion of a building at *Glenfield* which Mr. *Fulton* was employing in another business of his own, and which so occupied is part or the whole of the building where the original manufacture of *Glenfield* starch was carried on. Some time before this the Appellants had removed their works from *Glenfield* to *Maxwelltown, Paisley*, in the neighborhood of which latter place *Glenfield* is situated. Having conceived that idea, the Respondent set up his manufactory at *Glenfield*. Now what is *Glenfield*? *Glenfield* is not a town like *Burton-upon-Trent*, from which ale is named, and in which there are many manufacturers of the so-called "*Burton Ale*." Nor is it a place which has any special circumstances connected with it (although something was attempted to be said about the water used in the manufacture) which would make the starch manufactured there particularly good. But it simply happened that this starch was manufactured at the place called *Glenfield*, which is really only a place of about sixty inhabitants. It is not a parish, it is not a hamlet, it is not a district of any special *character, but it was an estate of that name upon which [513 some people seem to have erected some houses or manufactories, and upon which now some sixty people are living. There was, therefore, nothing whatever to give particular celebrity to the

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name of *Glenfield* so connected with a starch manufactory, beyond the fact that the Appellants had manufactured an article known by that name, and having a very large sale under that name.

That, of course, was a fact of considerable importance and value to anybody who should be minded to appropriate the name of "*Glenfield*" to his starch.

That being so, the Respondent prepares his labels for his starch, and upon those labels he takes the course of not calling it "*Glenfield Starch*" *eo nomine*, but he puts a view of a palace, either *Holyrood* or *Balmoral*, as the case may be, upon the top of his packets, instead of a picture of the manufactory which was placed upon the top of the Appellants' packets, and he puts the name of *Currie*. He does not put the name of Mr. *Wotherspoon*, and does not call it "*Glenfield Starch*," but he calls it "*Royal Palace Starch*," and he puts "*Royal Palace*" on the top of the article — then down at the bottom you see the name of "*Currie*." But on either larger or darker letters, as the case may be — sometimes larger and sometimes darker than any other word upon the packet — and as the last word of the whole, you see written in very distinguishing and very "emphasized" characters, as one of your Lordships has called it, the word "*Glenfield*." In that state of preparation he sends out his goods.

Nothing is relied upon by the Appellants (and very properly) with respect to the shape or form of the packets, because it appears that all starch manufacturers are in the habit of making their packets in much the same shape and form. The wrapper is of a light blue paper with a green label on the outside of it describing the article and giving directions for its use. In every respect the packets sent out by all starch manufacturers would be like those sent out by the Appellants and the Respondent, with one or two exceptions. There would be upon each person's packet the name of the manufacturer, and if he has given his article a name, as the Appellants had given their starch the name of "*Glenfield Starch*," there would be the name, for example "*Glenfield Starch*." The Respondent in the same 514] way puts his name "*Currie*," and also the name of the starch, "*Royal Palace Starch*," and these things appear upon the packet. These, no doubt, are the two material things — the

name of the manufacturer, and, if the article has a name of its own, the designated name of the article.

But there is one remark that I have had occasion to make upon very many opportunities which have occurred to me whilst I have been on the bench with regard to this circumstance of the likeness of packets of goods made up by different manufacturers in a particular trade. The same thing occurred in a case that I had before me with respect to packets of needles. You may see packets of needles done up in much the same way as those packets of starch were, that is to say, in dark blue paper with a green label, as for that peculiar article of trade. I took occasion to remark in that case, and that is the only remark to be made upon what the Respondent has done in this case, that when there is so much general similarity, it does become the more necessary to take care that the mark which is to distinguish the article shall be really distinguishing, and that when you have got all the other combinations, so that persons do not look at the shape of the packet, or at any other *indicia* of the packet than the particular distinguishing mark (in this case the name of the man, or the fancy name of the article), those things should, by people who wish to deal honestly by each other, be kept very distinct. Therefore the name "*Currie*" ought to be distinct, as I believe it is, and the name of the article again, if it has acquired a name, should not, by any honest manufacturer, be put upon his goods if a previous manufacturer has, by applying it to his goods, acquired the sole use of the name. I mean the use in this sense, that his goods have acquired by that description a name in the market, so that whenever that designation is used he is understood to be the maker, where people know who the maker is at all — or if people have been pleased with an article, it should be recognized at once by the designation of the article, although the customers may not know the name of the manufacturer. It may very well be that hundreds of people like *Glenfield Starch*, and order it because they think that it is the best starch that they ever used, without having heard the name of Mr. *Wotherspoon*, and without knowing him at all. They say, I want the thing that bears that name, the thing made in a particular way, made by the manufacturer *who makes it in that way, and there being only [515

one manufacturer who does make it in that way, I want the article made by that manufacturer.

That being so, it appears to me that the Respondent, if he was an honest manufacturer setting up in business, would take great care, and all the more because he was setting up in business in a place where *Glenfield Starch* had been manufactured and sold, to disconnect his name with any name which had become exclusively a designation of an article manufactured by the Appellants. There is a passage in the Respondent's answer in which he says: "There is no reason in the world why I should take the name, because I manufacture something superior, and at a cheaper price, therefore why should I take the name of the Plaintiffs?" Well, then, one naturally asks, why should he do anything to lead people to suppose that his name is to be in any way associated with *Glenfield*, or this inferior article (as he says) with his. It must be damaging to him that his "*Royal Palace Starch*" should ever be called "*Glenfield Starch*." If this statement of his be true he would desire above all things to dissociate himself from a name by which an inferior article could be palmed off as his; but, on the contrary, there is not a tittle of evidence of his ever having advertised his article as "*Royal Palace Starch*," alone or gone about selling it merely as "*Royal Palace Starch*."

But we have this farther evidence, which is of the greatest importance, and which I pointed out during the argument. One witness, to my mind, is as good as twenty or thirty for this purpose; there were several others of a similar character, but none whose evidence so strongly pressed on my mind as that which I am about to mention. I refer to the evidence of a witness of the name of *Bentley* — not an unfriendly witness, for he made an affidavit both for the Appellants and for the Respondent. What Mr. *Bentley* tells you plainly and distinctly is this: Mr. *Fisher*, who is the agent of the Respondent—what we should call his traveler going round selling his goods—comes to me and asks me to buy some "*Glenfield Starch*." Now in so doing he was doing that which was extremely wrong, although it is true that *Bentley* would know that *Fisher* was acting for *Currie* and not acting for *Wotherspoon*. But it struck *Bentley* as wrong, 516] and accordingly he said: "I had some *conversation with him about his using that term '*Glenfield*,' and I asked him

about it, and I had some conversation about the exclusive use of the name, in which he said: 'The Plaintiffs are not entitled to use it exclusively, as they had left the original place of manufacture, and that Defendant's was the true '*Glenfield Starch*.'''

Then the Respondent called Mr. *Bentley* as a witness for him to explain his evidence with reference to Mr. *Fisher's*, and Mr. *Bentley* says: "I did not intend to convey an idea that Mr. *Fisher* had endeavored to induce me to purchase the Defendant's starch as the starch of the Plaintiffs. There was no attempt by Mr. *Fisher* to sell his goods under any false impressions." But that is not the strength of his former evidence. He does not deny or retract a single word that he said in his original affidavit, but all he says the second time is: "He did not give me the impression, nor did I think that he intended to give me the impression, that the Defendant was manufacturing the Plaintiffs' goods." Of course not to Mr. *Bentley*. *Bentley* knew them both. Mr. *Bentley's* question to him was: "How came you to use the name which has been used by Mr. *Wotherspoon* hitherto?" Mr. *Fisher* himself in his affidavit tries to get out of these words altogether, and tries to throw them upon Mr. *Bentley* himself as having made the observation, "Yours are the original works." He says, I did not say "Ours are the original works," but Mr. *Bentley* said facetiously "Yours are the original works." Mr. *Bentley* says in his explaining affidavit that he said nothing of the sort, and he does not retract anything that he said before.

It seems to me, therefore, to come to this, that you have distinct evidence that when the word "*Glenfield*" is put upon the label it has been put there with an object, and that that object has been carried into effect by the Respondent's agent. Now what was the Respondent's intent in putting "*Glenfield*" in a conspicuous place without there being any necessity whatever for putting it there? It is admitted that *Glenfield* is not a post town, nor a postal district, or anything of the kind. Why was the word "*Glenfield*" placed in a conspicuous position on the label without any necessity? In order that Mr. *Fisher* may go round and say, "There is my *Glenfield Starch*; will you buy it? Ours is the original *Glenfield Starch*; will you buy it?" It is as plain and *manifest as anything can possibly be that [517 "*Glenfield*" is put there for that express purpose, there being

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no other possible reason, as I said before, why it should be put there.

There was a faint attempt, which only makes the case worse, to show that it was necessary to put "*Glenfield*" on the labels because the business address of the manufacturer was there, the truth being that his business address was not there; that address was at No. 14, *High Street, Paisley*. In the directory Mr. Currie's private address when he is at home is given as *Glenfield*, and his counting house, his place of business, the place to which his orders ought to be directed, is not in *Glenfield*, it is at *Paisley*. Therefore, there being everything else which might be calculated in the case of an unwary customer to show that these goods are like every other starch goods, they being wrapped up in the particular covers which are ordinarily used in the starch business, and he saying, "All I want to look at is what is the name of it," when he looks down at the bottom and sees in large letters "*Glenfield*," he says, "That is the thing; *Glenfield Starch* is the thing I am looking for. I do not remember the name of Mr. *Wotherspoon* or of Mr. *Currie*; I do not care about the name of any particular person, but I want *Glenfield Starch*." Therefore it is in fact admitted that the designation "*Glenfield Starch*" is appropriated, and it seems to me that the case is at an end when once it has been shown that a man going round and selling this starch gives it that name and asks people to buy it by that name.

But the case does not rest there, because there is abundant evidence that when *Glenfield Starch* is asked for in retail shops the Respondent's goods are sold as *Glenfield Starch*, which is the designation and characteristic of the Appellants' goods. It has been long ago pointed out in decided cases that it is not upon a *mala mens* toward the first purchaser that the decision of these cases rests. The first purchaser buys the goods cheaper for the very purpose of being able to sell them as *Glenfield Starch*, the means of doing so being put in his hands by his being furnished with goods with this label — I will not say in order that he may deceive, but it is a necessary consequence that he is enabled to deceive others by this means. There is evidence that this is an article sold by retail at the same price as the Appellants' goods, 518] although *it is bought at a less price from the Respondent in order that it may be so sold. That is just the very case

of all others in which the Court has constantly interfered to prevent that which is a distinct fraud.

My Lords, I think that authorities quite sufficient to support this case may be found, if it is necessary to refer to special authorities for any purpose whatever with respect to fraud, which you can hardly define. In the case of *Franks v. Weaver* ⁽¹⁾, a very remarkable case, where a man had put his own name, but had taken care to introduce the name of "*Franks*" by way of showing what a valuable invention it was that Mr. *Franks* had made. Though he put his own name as the actual manufacturer of the article, the Court saw through the device and said, "You want to get the name of Mr. *Franks* upon your label and you take this means of doing it—it is an ingenious means, no doubt—but we shall stop your so putting the name of Mr. *Franks* there because it operates as a deception." Accordingly, in this case, I apprehend that the Appellants ask only what they have a right to ask, namely, an injunction to prevent the use of the name of "*Glenfield*" upon the labels. Another of the authorities was a case which came before a noble and learned Lord on appeal, with respect to *Anistolia* liquorice, it was before Lord *Cramworth*. The offence consisted in putting upon the labels that which naturally led, and from evidence of suspicious conduct we are justified in saying was intended to lead, to the conclusion on the part of the public that whilst they buy the Respondent's goods they are buying an article manufactured by the Appellants, they do buy it in consequence of a name being used the celebrity of which was first acquired by the Appellants, and the value of which was first acquired by its being applied to the Appellants' manufacture, which of course they think it continues to be.

[His Lordship then referred to the prayer of the bill, certain words of which he proposed should be omitted from the order made upon granting it, and added :—] The Appellants do not wish an inquiry to be made as to the amount of damages. In fact, we here concur entirely with the view taken in *Scotland* upon the *same subject matter. The same decree in [519 effect has been granted in that country. I think, therefore, that the decision of your Lordships should be, that the order of the Lord Justice which has been complained of, and the decree

⁽¹⁾ 10 Beav., 297.

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of Vice-Chancellor *Malins*, in which he felt himself compelled to follow the Lord Justice, must be reversed, and that a proper decree should now be made, granting an injunction to the Appellants in the terms of the first paragraph of the prayer, altered in the manner I have suggested; and ordering that the Respondent should pay the costs of the suit, excluding of course the costs of the appeal.

LORD CHELMSFORD :

My Lords, I entirely agree with my noble and learned friend. When the principle is ascertained upon which the question of piracy of trade marks is to be determined, each case must be considered, upon the fact whether they do or do not bring it within that principle. Where the trade mark is not actually copied, fraud is a necessary element in the consideration of every question of this description — that is, the party accused of piracy must be proved to have done the act complained of with the fraudulent design of passing off his own goods as those of the party entitled to the exclusive use of the trade mark. For the purpose of establishing a case of infringement it is not necessary to show that there has been the use of a mark in all respects corresponding with that which another person has acquired an exclusive right to use, if the resemblance is such as, not only to show an intention to deceive, but also such as to be likely to make unwary purchasers suppose that they are purchasing the article sold by the party to whom the right to use the trade mark belongs. Has the Respondent, then, been proved to have infringed the Appellants' trade mark within the established principle?

The Appellants do not, as was suggested in argument, complain of the use of blue wrappers with great labels, although in their bill they mention, by way of narrative, the use by the Respondent of wrappers and labels of this description. It is quite clear that they were the ordinary wrappers and labels used by the trade generally. But what the Appellants ask for in their prayer is an injunction against using the word "*Glen-520] field*" in or upon any *labels affixed to packets of starch manufactured by the Respondent.

There were many circumstances to show that the Respondent did that which gave his starch the character of being the

starch manufactured by the Appellants, and that he did it *malo animo*; some of the circumstances may be a little minute, but they all tend to the same conclusion.

In the first place it may be asked why he selected the words "*Royal Palace Starch*," and put them prominently forward in his title. There cannot be the slightest doubt that it was because on the labels of the Appellants their starch was stated to be "exclusively used in the Royal Laundry." Then, again, why did he place the word "*Glenfield*" on his labels in such a manner as to be prominently distinguishable from any other thing upon the label? Either it was much larger than any of the other words, or else it was very dark, so as to be sure to catch the eye of an intending purchaser? The reason which is given for the use of the word "*Glenfield*" is that it was "a necessity." I think that is the expression—that it was only used by necessity as being *Currie's* address. Well, but why by necessity? It was not his place of business—his place of business was at 14, *High Street, Paisley*. There, as his traveler says, all the books were kept and all the correspondence was addressed. Therefore, here is a false explanation given of a fact which is very striking in itself, namely, the use of "*Glenfield*" in so prominent a way as certainly to lead everybody at the first sight of the label to believe that it related to *Glenfield Starch*.

Now there is distinct evidence that the Respondent's agent passed off the Respondent's starch as "*Glenfield Starch*." My noble and learned friend has alluded to one portion of the evidence, to which he called attention in the course of this argument, which I think is so very important, as showing a distinct proof that there was this recommendation of the Respondent's starch as "*Glenfield Starch*" by his agent, that I will read it to your Lordships:—[His Lordship here read part of the affidavit of *Bently*.] Then there is the evidence of Mr. *Dickie*, who says that "In or about the month of February, 1869, he called upon me as representing the Defendant, who trades as *Currie & Co.*, and offered the *defendant's starch to me as '*Glenfield* [521 *Starch*,' by which name, and not as '*Royal Palace*,' or by any other name, he described it. I asked him how he came to call it '*Glenfield Starch*,' and he replied that it was made at *Glenfield*. The reason that I asked the question was, that I believed the Plaintiffs were the only makers of '*Glenfield Starch*.'" It is

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quite unnecessary to refer to other cases in which there has been a similar passing off of the starch of the Respondent as "*Glenfield Starch*." These two instances are quite sufficient.

I am satisfied by the evidence that the Respondent's object in getting possession of a small piece of standing ground, I may call it, at *Glenfield*, was for the purpose of commencing operations by acquiring a right to mention *Glenfield* in his advertisements, and that he followed this up by trying how near he could come to a deceiving resemblance of the Appellants' labels, and be safe from a charge of piracy. By prominent mention of "*Glenfield*" in his labels, and by the representations of his agent, he succeeded in passing off his starch as "*Glenfield Starch*," and it appears by the evidence that he has succeeded in drawing off from the Appellants a great number of their customers.

It appears to me that this case closely resembles that of *Seixo v. Provezende* (¹). Under all the circumstances I have not the slightest hesitation in agreeing with the conclusion at which my noble and learned friend has arrived.

LORD WESTBURY :

My Lords, I have very few words to add, and they will rather be directed to a summary of the conclusions arrived at by my noble and learned friends than any addition to anything they have stated.

I take it to be clear, from the evidence, that, long antecedently to the operations of the Respondent, the word "*Glenfield*" had acquired a secondary signification or meaning in connection with a particular manufacture—in short, it had become the trade denomination of the starch made by the Appellants. It was wholly taken out of its ordinary meaning, and in connection with starch had acquired that peculiar secondary signification to which I have *referred. The word "*Glenfield*," therefore, as a denomination of starch, had become the property of the Appellants. It was their right and title in connection with the starch.

Now the question is, has that property been invaded by the Respondent? I take the whole proceedings of the Respondent from the beginning to the end to be nothing in the world more than a contrivance for the purpose of getting the word "*Glen-*

(¹) Law Rep., 1, Ch. Ap., 192.

field” associated with his manufacture. If that be true, what the respondent has done has been done *malo animo*, with the view of possessing himself of the denomination which was the property of the Appellant. That is apparent upon the face of his label, and it is more apparent by the delusive account which he gives in order to assign to the label some reason independent of the true reason, namely, that he wanted to get in the word “*Glenfield*” in connection with his manufacture. The real object and design of the Respondent are not only proved by the *evidentia rei*, namely, the labels themselves, but they are also proved by the use which the Respondent has made of the word “*Glenfield*” in connection with his manufacture. It is clear, from the whole of the evidence, that his agents have represented his starch as the “*Glenfield Starch*,” and that he has got an increased currency and demand for his manufacture by the unlawful use of that particular word. I have no doubt, therefore, that this case comes within the principle on which the jurisdiction is founded — the principle being to prevent a party from fraudulently availing himself of the trade-mark of another which has already obtained currency and value in the market, by whatever means he may devise for the purpose, provided the means are devised in order to give him a colorable title to the use of the word, and provided it be shown from the manner in which he has employed those means that his object was from the beginning to invade the property of the Appellants. That is clearly demonstrated in the present case to my mind.

I have therefore no difficulty in joining in the resolution of the House to overrule the order of Lord Justice *James*, to reverse the decree of the Vice Chancellor, which was merely in obedience to that order, and to make a decree for the Appellants which, I apprehend, must be worded in some such form as this — namely, after the reversal of the decree and the order on which it was founded, *to go on to say that, the Appel- [523] lants, by their counsel at the Bar, waiving the account and the claim for damages contained in the second and third paragraphs of the prayer, the Court decrees a perpetual injunction to be issued from using the said word “*Glenfield*,” leaving out the words “applying the word ‘*Glenfield*’ to or in connection with starch manufactured by or for him,” which I suppose would be a difficult thing to do, but embodying in the decree the rest

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of the words contained in the first paragraph of the prayer, and also giving to the Appellants the costs of the suit.

Order and Decree appealed from reversed. Injunction granted restraining the Respondent, his servants and agents, from using the word "*Glenfield*" in or upon any labels affixed to packets of starch manufactured by or for him, and from in any other way representing the starch manufactured by or for him to be "*Glenfield Starch*," and from selling or causing the same to be sold as "*Glenfield Starch*," and from doing any act or thing to induce the belief that starch manufactured by or for him, the Respondent, is "*Glenfield Starch*" or starch manufactured by the Appellants; the Respondent to pay the costs of the Appellants in the Court below.

Lords' Journals, 18th April, 1872.

Solicitors for the Appellants: *Willoughby & Cox.*

Solicitors for the Respondent: *Roberts & Simpson.*

[*Law Reports*, 5 House Lords' Cases, 532.]

March 8, 11; April 19, 1872.

532 *CHARLES HENRY ANSLEY MARTELLI, Appellant;

AND

H. F. KINGSFORD HOLLOWAY and HORATIO EDWARD HOLLOWAY,
Respondents.

Will—"In possession"—"*Provided always*"—*Estate tail by Purchase*—*Perpetuities.*

The phrase in a will "estate tail in possession" does not necessarily mean actual possession, but may be construed as meaning entitled to a vested estate tail in the property, though it may be vested in remainder and the party entitled may not be in actual possession, a previous life estate existing at the time.

Foley v. Burnell (1) adopted.

There may be a particular clause in a will which on one construction appears to offend against the law relating to perpetuities, but, if it is fairly capable of another construction which avoids that objection, the latter construction will be preferred, especially if it is found to be in accordance with the general intention of the will.

Where there has been a decree (all the parties interested being before the Court), long acquiesced in, which declared a direction for accumulation to be void for remoteness, but also declared that the will was well executed, and that the trusts thereof (except that direction) ought to be carried into effect, the presumption will be that a possible objection to a similar clause in the will had not been overlooked, but had been considered and decided on before the declaration to carry the trusts of the will into execution was made.

The words "provided always" are to be considered as words of reference to all that has gone before them. They constitute a qualification of the preceding limitations.

A testator after giving several legacies directed his trustees to invest dividends and rents, and profits, and the annual proceeds of his real and personal estates, during the time that any person beneficially interested in those estates should be under twenty-one, in order to accumulate the personal estate. They were then to hold his real and personal estates for his first grandson, the eldest son of his daughter, then living, for his life, and after his decease for the first and other sons of that grandson in tail, remainder over to the other sons of the daughter. After other remainders there was an ultimate trust for the testator's right heirs and next of kin according to the nature and tenure of the trust estates respectively. Then followed this proviso: "I declare it to be my will and meaning, that such person as shall under this my will be entitled to an *estate tail in possession* in my real estate, shall not *be *absolutely entitled* to my leasehold [533 and *personal estates* until he, &c., shall attain the age of twenty-one, and that my leasehold and personal estates shall *absolutely belong* to such person, &c., as shall first attain the age of twenty-one and become entitled to an *estate tail in possession* in my real estates under the trusts aforesaid." The eldest grandson was in possession of the life estate — his eldest son died under twenty-one without issue — but his second son attained that age during his father's lifetime:

Held, that this proviso was not a new and independent disposition, but a qualification of all the preceding limitations:

Held, also, that the second son fulfilled all the conditions of the proviso and was absolutely entitled to the personal estates.

This was an appeal against a decision of Vice-Chancellor Stuart.

Thomas Holloway, by his will dated the 2d of September, 1813, divided all his property real and personal to three trustees. After giving certain pecuniary legacies he devised all his real and leasehold and other personal estate to trustees upon trust to convert his personal estate and invest the dividends thereof,

(1) 1 Bro., C. C., 274; 4 Bro., P. C., 819.

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and also the rents and profits of his real estate from time to time as and when and so often and during all such times as any person or persons beneficially interested in or entitled to his real and personal estates under the trusts thereafter declared thereof should be under the age of twenty-one years, adding all such investments to his personal estate, in order to accumulate the same; to pay to each of his grandchildren not entitled to his real and personal estate the sum of £1000. And, subject to the trusts thereinbefore declared as to his freehold, copyhold and leasehold, and real and personal estates thereby devised and bequeathed, and the stocks, moneys, and securities to be purchased and invested as aforesaid, the said trustees were to stand seized and possessed thereof to the use of the testator's grandson, the first or eldest son then living of his daughter *Catherine*, and then of the age of five years or thereabouts, during his natural life, and from and after his decease for the first and every other son of that son successively, according to seniority, and the heirs of their respective bodies, and on failure, &c., for the second and third and every other son of his said daughter in like manner, with remainders over to the daughters of the eldest grandson as tenants in common, and the heirs of their respective bodies, with divers remainders over, and an ultimate trust for the testator's right heirs and next of kin according to the nature and 534] tenure *of the trust estates respectively. Then came this proviso: "Provided always, and I declare it to be my will and meaning, that such person or persons as shall under this my will be entitled to an estate tail in possession in my said real estate, shall not be absolutely entitled to my leasehold and personal estates until he, or she, or they respectively shall attain the age of twenty-one years, and become entitled to an estate tail in possession in my said real estate, shall not be absolutely entitled to my leasehold and personal estates until he, or she, or they respectively shall attain the age of twenty-one years, and that my said leasehold and personal estates shall absolutely belong only to such person or persons as shall first attain the age of twenty-one years, and become entitled to an estate tail in possession in my real estate under the trusts aforesaid, and in the meantime the said leasehold and personal estates shall remain subject to the trusts hereinbefore declared thereof notwithstanding any thing hereinbefore declared to the contrary."

The testator died on the 22d of January, 1816, leaving *Catherine* (the wife of *H. Martelli*) his only child and heiress-at-law. Mrs. *Martelli* had three sons, *H. F. Kingsford Martelli*, *Charles Henry Ansley Martelli* and *Thomas Chester Martelli*. The latter of these two had since died, and the former is the Appellant in this case.

Immediately after proving the will the trustees instituted a suit in the Court of Chancery to have the trusts of the will carried into effect under the direction of the Court. Lord Chancellor *Eldon*, in 1820, pronounced a decree declaring that the eldest grandson (*H. F. Kingsford Martelli*), an infant, took a vested estate for life, and that the trust for accumulation was void for remoteness ⁽¹⁾.

H. F. Kingsford Martelli, the eldest son, entered into possession of the estates, and took the name and arms of *Holloway*, in accordance with a provision in the will. He married and had six children: *Charles Breton Holloway* (who died before he became of age), *Horatio Edward Holloway* (who attained twenty-one on the 8th of November, 1867, and is one of the two Respondents), *Francis Holloway*, and three daughters.

Charles Henry Ansley Martelli (the second son of *Catherine Martelli*) claimed the beneficial interest in the leasehold and personal estates of the testator, on the ground that they did not vest in *Charles Breton Holloway*, the first person entitled as tenant in tail (who died before he became of age), but, on his death, resulted, *subject to *Kingsford Holloway's* life in- [535 terest therein, for the benefit of the testator's daughter *Catherine*, the widow of *H. Martelli*, and the next of kin.

In March, 1864, *Kingsford Holloway*, the tenant for life, filed his bill against the trustees and the various parties interested (including the next of kin of the testator) praying for an assignment to himself of the leasehold and personal estates of the testator, that the suit might be taken as supplemental to that of *Marshall v. Holloway*, and for farther relief.

In December, 1864, the Defendants put in a joint and several answer to this bill.

In February, 1868, *Horatio Edward Holloway*, the second (but the elder surviving) son of *Kingsford Holloway*, having attained twenty-one, filed his bill in Chancery against the trustees and

(1) 2 Sw., 432.

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all proper parties, praying that it might be declared that in the events which had happened he, the Plaintiff, and his father *Kingsford Holloway*, were alone entitled to the leasehold and personal estates of the testator; that proper directions might be given for the conveyance and assurance of the freehold and copyhold estates of the testator, and for the assignment of his leasehold and personal estates to the uses and trusts of the will; that this suit might be taken as supplemental to that of *Marshall v. Holloway*; and for farther relief.

In April, 1868, these suits came on to be heard together before Vice-Chancellor *Stuart*, upon motion for a decree. By a decree made on the 15th of July, 1868, His Honor declared that, according to the true construction of the will, *Horatio Edward Holloway*, the first tenant in tail under the will who had attained the age of twenty-one years, was, subject to the life interest of *Kingsford Holloway* (his father), absolutely entitled to the leasehold and personal estates of the testator; and conveyances and assignments were ordered accordingly ⁽¹⁾. This decree was enrolled in November, 1868, and this appeal, by *Charles Henry Ansley Martelli*, was then brought. *H. F. Kingsford Holloway*, the tenant for life, had died since the decree, and *Horatio Edward Holloway* then entered into actual possession of the estates.

536] *The *Solicitor-General* (Sir, *G. Jessel*), and Mr. *Charles Hull*, for the Appellant:

The real question to be determined here is the construction of the proviso. That not merely cuts down the previous gift, but it is more than a mere proviso having that effect; it is a dispositive clause, and must be construed as such. If so construed it must be treated as disposing of the personalty in the same manner and for the same purposes as the direction for accumulation, which has already been declared void. No words can be added to it by implication. The Vice-Chancellor really attempted to add to it words which he thought he might introduce by construction, treating the words "entitled to an estate tail in possession" as if they were "estate tail in possession by purchase." He thought that he was justified in doing this by the authority of *Christie v. Gosling* ⁽²⁾. But the two cases ma-

⁽¹⁾ *Holloway v. Holloway*, Law Rep., 6 Eq., 523.

⁽²⁾ Law Rep., 1 H. L., 279.

terially differ from each other. In that case the proviso was referential, here it is independent and it must be so construed. It introduces a new class too remote, by law, to take. The personalty did not vest here in the first tenant in tail: *Dun-gannon v. Smith* ⁽¹⁾, nor has it since vested in the Respondent.

The personalty here was not to vest except in a person who fulfilled these conditions—he was to be tenant in tail of the real estate, and in possession, and he was to be twenty-one years of age. If all these conditions were not fulfilled he had no title to it. Here the first tenant in tail had died under twenty-one; the personal estate, therefore, did not vest in him. The next tenant in tail was the Respondent, but he was not tenant in tail in possession, for when, by the death of his elder brother, he became entitled to the estates as tenant in tail, he had but a bare title and not the possession, for that was in his father, the tenant for life. The words “in possession” cannot be rejected, they are a substantive part of the gift, and they must mean actual possession: *Scarsdale v. Curzon* ⁽²⁾. In no way were the words of the proviso complied with, and the personal estate consequently went to the next of kin. *Harrington v. Harrington* ⁽³⁾, and *In re Johnson's Trusts* ⁽⁴⁾, do not affect *this case. The provisions in the wills there are entirely [537 distinct from those which are to be found here.

The parties here are not absolutely bound by the former decision in this case, but are entitled to bring before the Court the construction of the proviso. The declaration formerly made that the trusts of this will are to be carried into effect does not affect the devolution of the personal estate under this proviso, the construction of which does not appear to have formed part of the original decision. This is a suit to carry the decree then given into execution; but to have that result it must be shown to be correct in itself, and to embrace the subject-matter now under discussion. *Lechmere v. Brasier* ⁽⁵⁾, *O'Connell v. M'Namara* ⁽⁶⁾, *Slamer v. Nisbitt* ⁽⁷⁾, and *Hamilton v. Houghton* ⁽⁸⁾, show that a decree is not to be extended to matters not necessarily

⁽¹⁾ 12 Cl. & F., 546.

⁽²⁾ 1 Jo. & Hem., 40, 65-6.

⁽³⁾ Law Rep., 5 H. L., 87.

⁽⁴⁾ Law Rep., 2 Eq., 716.

⁽⁵⁾ 2 Jac. & W., 287.

⁽⁶⁾ 2 D. & War., 411.

⁽⁷⁾ 2 J. & Lat., 447.

⁽⁸⁾ 2 Bli., 169.

nor expressly contained in it. And in *Gooch v. Gooch* ⁽¹⁾ it was declared that a decree to execute the trusts of a will does not make valid trusts which on the face of the will are bad. Lord *Eldon's* decree, therefore, though perfectly good as to the accumulations, leaves the case open to discussion as to the meaning of this proviso, and that decree applied to the present case shows that the direction for accumulations being bad, the whole provision relating to the personal estate failed of effect and it passed to the next of kin.

Sir *R. Palmer*, Q.C., and Mr. *Waley*, for the Respondent:

The case of *Foley v. Burnell* ⁽²⁾ is a complete authority for what has been done here. The principle there laid down was worked out in *Christie v. Gosling* ⁽³⁾ and in *Harrington v. Harrington* ⁽⁴⁾. If there are words in a will capable of an interpretation indicating an intention which the law will not allow to be carried into effect, and also capable of indicating an intention which the law will permit to be carried into effect, the Court will give them the latter interpretation, and the more so if that is, as it is here, in accordance with the plain desire of the testator, as shown in the other parts of the will. The decision of 538] Lord *Eldon* on the question of *remoteness was confined to the direction as to accumulations — he held that that direction was void for remoteness, but as to the rest he expressly declared that “the will was well executed and proved, and that the trusts thereof ought to be carried into execution” ⁽⁵⁾. That really decided the present case. It is impossible to believe that, having the whole will as well as all the parties before him, he would make that declaration if he thought that this proviso as to the vesting of the personal estate was open to the same objection as that which affected the direction for accumulations. There is no authority for the proposition that when the Court has made a decree which has never been reversed, nor even attempted to be reviewed, it shall yet at a distant time, when it is sought to be enforced, be denied its due operation. *Scarsdale v. Curzon* ⁽⁶⁾ does not at all impeach the construction which has been put on this will.

⁽¹⁾ 8 De G. M. & G., 366.

⁽²⁾ 1 Bro., C. C., 276; affirmed 4 Bro., P. C., 319.

⁽³⁾ Law Rep., 1 H. L., 279.

⁽⁴⁾ Law Rep., 5 H. L., 87.

⁽⁵⁾ 2 Sw., 450, 451.

⁽⁶⁾ 1 Jo. & Hem., 40, 65-6.

Mr. *Eddis*, Q.C., and Mr. *F. M. Robinson*, appeared for the personal representatives of the tenant for life, but he not having joined in the appeal, they were not permitted to address the House.

The *Solicitor-General* replied.

THE LORD CHANCELLOR (Lord *Hatherley*):

My Lords, this an appeal from a decision of Vice-Chancellor *Stuart* founding itself upon a decree of your Lordships' House in *Christie v. Gosling* ⁽¹⁾ as to the construction of a will. The Appellants insist that, regard being had to a proviso therein contained, the bequest, which is in the prior part of the will, and was inserted with reference to the disposition of the personalty, has become ineffective, owing to the attempt made on the part of the testator to create a series of limitations of his property which would offend against the law established to prevent the creation of perpetuities. And the Appellants in this case have greatly relied upon a decision by Lord *Eldon*, which, singularly enough, took place in the year 1820, upon a clause of this very will — but affecting another portion of the will and another series of trusts — in which it was held by that great authority, that the provisions of the will, as far as regarded the particular points there decided, were such as to offend [539 against the law as to perpetuities.

The testator here, who died as long ago as the year 1816, created a series of trusts on his real and personal estate, by which he intended (as has often been the case in wills of a similar description) to carry the real estate and the personal estate together as far, at all events, as the skill of the draughtsman could achieve that object. And he seems farther also to have desired to tie up the estate, and to render it inalienable, so far as he could, within the limits of the law, contrive so to do. The direction which he gives first as to the accumulation of rents and profits of his real estate and the interest and income of his personal estate is one that is struck at by the decree of Lord *Eldon*. After directing the payment of his debts from his personal estates, and after directing the investment of the surplus remaining after the payment of his debts, the testator directs

(1) Law Rep., 1 H. L., 279.

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that his trustees shall invest the rents and profits of the real estate, and the dividends, interest, and other proceeds of his personal estate, "from time to time, as and when, and so often and during all such times as any person or persons beneficially interested in or entitled to my real and personal estates under the trusts hereinafter declared thereof shall be under the age of twenty-one years, adding all such investments to my personal estate in order to accumulate the same." That was the trust that was then complained of.

Then we must look to the trusts of the real and personal estate, and they were these:—He first of all created an interest for life in a boy, his grandson, there described, I think, as being of five years, the son of his daughter *Catherine*. Then from and after his decease upon trust for the first and every other son of his body successively issuing in priority according to their seniority of age, and the heirs of their bodies respectively. That is enough, I think, to read with reference to that limitation; so that he created a life estate in this grandchild, and then he created a series of estates in succession in the first and other sons of that grandchild; and that carried both the real and the personal estate. Then the result of his direction for the accumulations of the rents and profits of the real estate, and the income of the personal estate of this property, was held by Lord *Eldon* to amount to a direction that so long as there should be any.

540] *person under the age of twenty-one years taking an interest as a tenant in tail under the limitations contained in this will, the accumulations should continue until the person so taking the estate tail should have attained the age of twenty-one years. That of course, regard being had to the limitations of the real estate, would necessarily create a perpetuity, because any son of his grandchild taking an estate tail and dying (as actually happened in the case before us) during the lifetime of his father the tenant for life, and leaving (which has not occurred here) a son to take as tenant in tail by descent from him, would produce a state of things in which there would be a tenant in tail, namely, the great grandson's son who would take by descent from his own father, through himself being the grandson of the first taker under the will; and that tenant in tail by descent might die under the age of twenty-one having married at the age of eighteen or nineteen (as might possibly be the case) leav-

ing another child to succeed him as tenant in tail by descent, and so on, leaving the estate (as Lord *Eldon* expressed it in one of the numerous cases which are to be found in the books upon the subject) leaving the estate to travel through minorities for centuries. And accordingly the accumulation would be directed for a period which the law undoubtedly would not allow.

That being so, the learned Judge came to the conclusion that the whole of that trust for the investment of the rents and profits of the real estate, and the accumulation of the dividends of the personal estate, was void as being too remote. And accordingly, in the bill filed in 1816 for carrying into effect the trusts of the will, a decree was made, dated in 1820, which declared that the trusts as regarded this matter of accumulation were void; but it declared expressly that the trusts of the will ought to be carried into execution except as regards those trusts so declared to be void; and in respect of that portion of the trust which was declared to be void there was, of course, an intestacy. It was necessary to strike out these clauses altogether from the will, and to read the will as if they had never been inserted.

Now it is said that that decision ought to govern the case which is now brought before your Lordships by appeal. After those limitations of the real and personal estate of the testator's grand-child, who was five years old, for his life, with remainder [541 to the first and other sons of that child successively in tail, there comes a proviso, "Provided always, and I declare it to be my will and meaning, that such person or persons as shall, under this my will, be entitled to an estate tail in possession in my said real estate, shall not be absolutely entitled to my leasehold and personal estate until he, she, or they respectively shall attain the age of twenty-one years, and that my said leasehold and personal estates shall absolutely belong only to such person or persons as shall first attain the age of twenty-one years, and become entitled to an estate tail in possession in my real estate under the trusts aforesaid, and in the meantime the same leasehold and personal estates shall remain subject to the trusts hereinbefore declared thereof, notwithstanding anything hereinbefore contained to the contrary."

As regards the trusts for accumulation, of course those have been struck out, and have been considered, under the decree of Lord *Eldon*, as if they were entirely effaced from the will.

The other trusts have been directed to be carried into execution, and the decree of Lord *Eldon* is set out *in extenso* in the Appendix. It occupies a very large portion of the Appendix, because the decrees of that day contain all the pleadings and all the proceedings; and there is an express declaration of the trusts upon which the property would be held when that excepted portion had been taken out of it, which were the trusts, in fact, following the very words of the will, and on that account, I suppose, declaring, both as to real and personal estate, an estate for life with remainder to the first and other sons and their issue. But of course as to the personal estate, the personal estate could not descend in any way to the persons who would be tenants in tail of the real estate, but the personal estate must go to the first tenant in tail, whoever he may be, and, unless it is excluded by this proviso, must go to him absolutely.

Now I can quite understand why the conclusion may have been come to as to the accumulation of the personal estate, wholly without reference to the question which is now brought for your Lordships' consideration; because it was evidently the intention that one common fund should be formed of the rents and profits of the real estate, and the income of the personal [542] estate. That being so, *the rule which was applied in *Christie v. Gosling* ⁽¹⁾ would hardly be that which would occur to the mind of Lord *Eldon* when he decided the case of *Marshall v. Holloway* ⁽²⁾, inasmuch as what was aimed at by the direction in *Marshall v. Holloway* was the accumulating of one entire fund compounded of two sets of accumulations, the accumulations of rents and profits of the real estate, and the accumulation of the dividends of the personal estate. Wholly without regard, therefore, to any application of such a rule as was applied in *Christie v. Gosling* ⁽¹⁾, the Court might well have held that it was intended to form one compound accumulation fund, which compound accumulation fund could not be formed, with reference to the rents and profits of the real estate, under any circumstances, because there the accumulation might travel on during many minorities, and the application of the rule since made in *Christie v. Gosling* ⁽¹⁾ was interfered with by these two funds being fused into one common fund, which was to go over when

⁽¹⁾ Law Rep., 1 H. L., 279.

⁽²⁾ 2 Sw., 450-451.

the purpose of the accumulation should have been answered. And I apprehend that the matter had not been so closely looked into at that time, probably even by so great a Judge as Lord *Eldon*, as it afterwards came to be when *Christie v. Gosling* ⁽¹⁾ was under consideration. But, independently of that consideration, one can well see that there were grounds affecting the accumulation of the rents and dividends, and the formation of one common fund out of them, which would not apply to the present case, by way of defeasance of the interest in the personal estate created by the proviso we have now to consider.

It is also worthy of remark that that decree, so far as it goes, sustains the contention of the present Respondent very materially in this view. Lord *Eldon*, having the whole will before him, and having all the parties interested before him, did make an express declaration as to part of the will, that it went beyond what the law allowed, and must therefore be effaced from the will. And he made a declaration that, except as to that particular, the whole trusts of the will should be performed and carried into execution.

Now, coming to this proviso, the whole question is, whether the rule can be applied, under the circumstances of this case to the construction of the will which was applied in *Christie v. Gosling* ⁽¹⁾, *and was a most wholesome and (if I may be allowed [543 to say so of what has now become a settled rule) a most correct canon of interpretation applied to wills of this description, where it is attempted to knit together as long as possible the course of devolution of real and personal estate. There occur constantly cases of that description — provisions for keeping and tying up the personal estate as long as the law will allow, amongst other provisions of a character similar to that which we have now to consider. And in the case of *Christie v. Gosling* ⁽¹⁾, the Court laid down this rule, that, if you find a proviso which apparently might seem to carry the suspense of the vesting of the personal estate through a period of minorities which might last, as has been said, in certain events, for centuries, because the proviso which affects to make a defeasance of the personal estate speaks of those who take under the previous limitations of the will, which as far as the previous limitations of the will refer to real estate, might continue in a series of descents

⁽¹⁾ Law Rep., 1 H. L., 279.

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from the first taker by purchase to the issue in tail, in such a manner as to carry on that descent through a series of descendants in tail who might never attain the age of twenty-one, but might be in a condition to leave issue. If, said the noble Lords, who took part in advising the House in *Christie v. Gosling* ⁽¹⁾, when we are considering the question of personal estate we must take care to refer it wholly to the matter which the testator had in hand. He is speaking of a defeasance with reference to something he has done with his personal estate. That defeasance is not to be looked at with reference to provisions which have no concern with personal estate at all, unless those provisions are plainly and distinctly introduced as collateral events which are to limit the course of the personal estate. But we are to consider that he is only speaking of his personal estate, and of those who take an interest in that personal estate. Although the words may be considered to be general, and may appear to include those who take an interest in the real estate also, yet, regard being had to its being a limitation affecting only the bequest which the testator has made of his personal estate, you cannot conceive that he would introduce that limitation with reference to others, and with reference to what may be happening to others in whom no such interest 544] *can exist. He must be conceived as intending to defeat the interest of those who had an interest in some estate or benefit under his will. Therefore, when you find this clause saying that the interest is to be defeated in the event of the persons who take that personal estate under the will dying under the age of twenty one, or the like, you must necessarily confine it to the persons who take by purchase under the limitations of the will, it being a case of personalty. Because there is no person whatever who takes any interest in personalty by way of descent. And as to the persons who take by purchase, if the will is properly drawn (and it is conceded that this will is properly and perfectly drawn), as to the persons who take by purchase, you can apply it to those only who take by purchase, because they are the only persons who take an interest in the personal estate at all.

Now the persons who take by purchase are properly limited to those who take during the life of their parent, the testator's

⁽¹⁾ Law Rep., 1 H. L., 279.

grandson. And the clause restricting it deals only with those persons who, taking during the life of that grandson, take an interest in the personalty as purchasers. And as it regards all those persons who must come into *esse*, of course, during the life of their father, or the period allowed by the law for gestation afterwards, you may impose a condition upon them as to their taking, saying that in the event of their not attaining the age of twenty-one that property so given to them as purchasers, shall cease, with regard to them, in consequence of their not attaining that age, and shall pass on, in any way you may be minded to pass it on, in the terms of the will.

My Lords, it seems to me that in substance this case is not distinguishable from the case of *Christie v. Gosling* ⁽¹⁾ in that respect; because what the testator does by this proviso is simply this: He provides and declares that such person as shall, under the will, be entitled to take an estate tail in possession "in my said real estate shall not be absolutely entitled" to the personal estate until he or she shall attain the age of twenty-one. That does not mean any person who shall take an estate tail by descent, because the decision in *Christie v. Gosling* ⁽¹⁾ says that no such person as that could take an interest in the personal estate. The testator says *the person he is speaking [545 of as having an estate tail in possession shall not be entitled to the personal estate until he attains the age of twenty-one. That is, he means only those to be entitled in tail who, under the limitations of the will, could take the personal estate, that is, those who take as purchasers, and the subsequent words make that plain, if there could be any doubt, because he farther says, "that my leasehold and personal estate shall absolutely belong to such person or persons who shall first attain the age of twenty-one years and become entitled to an estate tail in possession under the trusts" therein declared. And that in the meantime they shall go according to the trusts "contained in my will."

Now the only possible question that could arise to distinguish this case from the case of *Christie v. Gosling* () is this, which has arisen upon the facts which were before the Court when the appeal was first presented. It appears that by a subsequent event which has happened even that question, if question it be,

(1) Law Rep., 1 H. L. 279.

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has been disposed of. The facts are these :— The tenant for life was alive at the date of the hearing of the cause before Vice-Chancellor *Stuart*, and at the date of the presentation of this appeal. The tenant for life had a first or eldest son, but that eldest son had died, whilst taking an interest in the estate tail, of course, as he did, in reversion, subject to his father's life interest. He died and left no issue. The second son, the person who has been declared to be entitled to the personal estate by the decree of the Vice-Chancellor, would then come in as tenant in tail in remainder after his father's life estate — he was also for some time an infant — but he has now attained, and at the hearing of the cause before the Vice-Chancellor he had attained, the age of twenty-one years. He was therefore tenant in tail in remainder with an absolute vested interest, and he had attained the age of twenty-one years.

But then it is said that the estate is only absolute in the case of those who shall have attained the age of twenty-one and become tenants in tail in possession. But it so happens that except for form's sake it is not in any way necessary to deal with that question, because since this appeal was presented, and since the hearing before the Vice-Chancellor, the father has died, and this gentleman has become the tenant in tail in possession, he 546] is of the age of twenty-one years, and holds the estates, according to the rule stated in *Christie v. Gosling* ⁽¹⁾; and the limitation is not void or in any way erring against the rule as to perpetuity. I therefore hold that the eldest son's interest was defeated by his dying under the age of twenty-one, and that the second son, now that he is actually tenant in tail in possession, and has attained the age of twenty-one, has beyond all dispute an indefeasible interest under the proviso of the will.

The only remaining question would be in point of form, whether, as in the case of the decree in the *Duke of Newcastle v. Lincoln* ⁽²⁾, the Court should take any notice of the occurrence which has taken place since the original hearing, namely, the death of the tenant for life bringing the tenant in tail in remainder into actual possession. I confess, my Lords, that I do not think it necessary to do so. I think the case of *Foley v. Burnell* ⁽³⁾ is a decision expressly in point upon this subject, and

⁽¹⁾ Law Rep., 1 H. L., 279.

⁽²⁾ 3 Ves., 887–897.

⁽³⁾ 1 Bro., C. C., 274, affirmed 4 Bro., P. C., 319.

that it is quite sufficient to enable us to read this clause as one in which the testator has used the expression "in possession" as meaning entitled to a vested estate tail in the property, though it may be vested in remainder, and the party entitled may not be in actual possession; because in that case of *Foley v. Burnell* (and there never was a stronger case upon the subject) the Lord Chancellor relied upon the evidence of the intention to keep the real and personal estate together as long as possible, and yet held that in reality that could not be effected under any possible mode of construction which could be arrived at under that will; and though there was a limitation to the father for life, and a direction that certain personal chattels (plate, I think, was the subject matter) should go as heir-looms to the one who should take an estate tail in possession, it was held that the true effect of the expressions used in that will was that an infant who took an absolute vested estate tail under the limitations of the will during the lifetime of the father, and then died during infancy (there being no provision there with respect to attaining the age of twenty-one) was entitled to the heir-looms, and those heir-looms did consequently vest in the infant; and, in the event which happened, the father being the *administrator of the [547] infant, became entitled to those heir-looms. No doubt the general intention of the will was to prevent it if possible; but when fairly considered there was no rule which the Court could devise that would effectuate the intention of the testator more completely, or, in fact, which would effectuate it at all. There were many other events which might have occurred which would have been equally embarrassing with reference to any construction to be given to the will. Therefore the Court held that what in reality the testator intended to do was this: he said, "When any person becomes actually entitled to the full benefit and complete interest in the real estate, that same person shall from that moment become entitled to the heir-looms;" the distinction being not between the manual possession of the rents and profits and the holding of the estate in remainder, but between a vested interest and a contingent interest in the estate tail that was so limited. And in this case of *Marshall v. Holloway* ⁽¹⁾, Lord *Eldon* adverts in some measure to that distinction, and speaks of cases in which it has been held

(1) 2 Sw., 450-451.

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that the word "possession" is capable of a meaning which may not refer to the actual manual possession of the rents and profits. In fact, if that was contended for in the case of an outstanding lease, it would be difficult or impossible to hold that a person was entitled to possession in that sense, inasmuch as the tenants would have the possession, and the property would not be in that sense in possession of the person entitled—he would be in possession of the rents and profits, but not of the estate itself. But in the case of *Foley v. Burnell* ⁽¹⁾ the difficulty really existed, and a construction had to be put in that case upon the whole intent and meaning of the will. And I think that that authority is strong enough to justify your Lordships in arriving at the conclusion that the Vice Chancellor was right in making the declaration, even when the father was living, and holding that this gentleman was entitled to the absolute interest in the rents and profits of the personal estate under the events which have happened.

My Lords, I have only farther to say, that this being a question upon the construction of a will, as to which there is undoubtedly some degree of difficulty, and there being that 548] decision of Lord **Eldon* as to the question of accumulation of rents and profits, which might have led the persons who advised this appeal to the inference that a similar conclusion might possibly be still farther extended; I think we shall be doing justice to all parties if we affirm the decree of the Vice-Chancellor without personal costs, leaving the costs to be paid out of the testator's estate.

LORD CHELMSFORD :

My Lords, the question upon this appeal is, whether the proviso following immediately upon the whole of the limitations contained in the will of *Thomas Holloway* is a qualification to be engrafted on the prior limitations, or an independent disposition adding a new class to the objects of those limitations.

In construing a will the whole of it must be taken into consideration to arrive at a testator's intention. And with this view it is not unimportant to observe that the testator knew the difference of the law as to real and personal estate, and had apparently, throughout the will, constantly before his mind,

(1) 1 Bro., C. C., 274, affirmed 4 Bro., P. C., 319.

the law against perpetuities, limiting his estates, not to the first and other sons of unborn children, but to those unborn children in tail.

It was said in argument that you are not in the construction of a will to take first the law against remoteness, and then apply the words of the will to the law, but to construe the words of the will, and afterwards apply the law to them. But in endeavoring to ascertain the meaning of the testator in a clause of his will which is ambiguous, and which, read in a particular way, sins against the law as to perpetuities, it is not improper to take into consideration that in the whole of the will he has carefully provided that the limitations of his estates shall not be open to the objection of being contrary to that law. And if the clause in question is capable of two constructions, one of which would render it void upon a ground which the testator throughout his will seems to have been anxiously guarding against, and the other of which is reconcilable with all his previously expressed intentions, there can be no doubt which of them ought to be adopted.

It is unnecessary to consider the limitations of the will except for the purpose of remarking how carefully the testator has, in the whole series of them, taken especial care to limit his estates *to unborn children in tail, and also to make all [549 the tenants in tail to take by purchase.

At the close of the limitations, and beginning with the words "provided always," which are words of reference to all that has gone before, comes the clause in question. This is said by the learned counsel for the Appellant to consist of two parts, the one declaratory, and the other dispositive; the dispositive part introducing a new class of objects which is too remote to be enabled by law to take under the disposition. If the proviso is to be so divided, the latter part of it would, in terms, extend beyond tenants in tail taking by purchase; but I read it altogether as one and indivisible, and then it is capable of an interpretation which will make it not a new and independent disposition, but a qualification of all the preceding limitations.

The latter part of the proviso appears to me to be almost a repetition of the former negative part in a positive form. The words are, "I declare it to be my will and meaning that such persons as shall, under this my will, be entitled to an estate tail

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in possession in my real estate shall not be absolutely entitled to my leasehold and personal estates until he or they respectively shall attain the age of twenty-one years." The only person who could become first entitled to an estate tail in possession under the will, and who would become thereby absolutely entitled to the leasehold and personal estate, would be a tenant in tail by purchase; and this part of the proviso does not touch the case of a person becoming tenant in tail on reversion, or that of a person becoming tenant in tail in possession, and dying under twenty-one and being succeeded by an heir in tail under twenty-one. But then the positive part of the proviso continues, without any break, in these words, "and that my said leasehold and personal estates shall absolutely belong only to such person or persons as shall first attain the age of twenty-one years, and become entitled to an estate in possession in my real estate under the trusts aforesaid." As observed by Lord *Eldon* in *Marshall v. Holloway* ⁽¹⁾, "the testator has not said that they shall not be beneficially interested; but shall not be absolutely entitled."

I think, in fair construction, this latter part of the proviso must be taken to refer to the same class of persons as the 550] former does; *and then, with a slight transposition of the words, which does no violence to their obvious meaning, the testator declares that his leasehold and personal estates shall belong only to such person or persons as shall become entitled to an estate tail in possession in his real estate under the trusts aforesaid, as shall first attain twenty-one years.

It is observable that this proviso is framed with an express reference to the trusts of the will; and therefore it appears, not only by its introductory words, but by this reference, to be a declaration that it is meant to be a qualification of the preceding limitations.

Now, a tenant in tail under the trusts of the will is one who in the first instance would take by purchase; and as such tenant in tail would become absolutely entitled to the leasehold and personal estate, the referential proviso must be applied to such person or persons. It therefore cannot be construed to be a disposition to a new class, and so to have a tendency to create a perpetuity, but it must be read as if it were interwoven with

(1) 2 Sw., 450-451.

the limitations and as qualifying them all by a condition imposed upon the tenant in tail in possession in respect of the leasehold and personal estate, and not as a description of the persons who are to become entitled to an estate tail, other than those who are comprehended within the limitations in the will. In this view the case appears to me to fall within the principle of *Christie v. Gosling* ⁽¹⁾, and that the decree of the Vice-Chancellor is right, and ought to be affirmed.

With respect to the minor question, as to the declaration that the Plaintiff, having attained twenty-one, is (subject to his father's life estate) absolutely entitled to the leasehold and other personal property, I agree with my noble and learned friend on the woolsack; but as the words of the will in this respect raise a fair question for consideration, I think the appeal should be dismissed without costs.

LORD WESTBURY :

My Lords, I quite agree with the contention of the Respondent that the argument we have heard, the case made on behalf of the Appellant, is not consistent with the decree of Lord *Eldon*. The *bill filed before Lord *Eldon* was a bill directed [551 expressly to the interpretation and to the execution of the trusts of this will. All parties were convened, and particularly the next of kin of the testator was a party Defendant in the cause. All persons interested, therefore, were parties to that suit, which was brought for the purpose of ascertaining how far the will was a valid disposition of the personal estate, and the argument was raised that, so far as the trust for accumulation was concerned, the will offended against the rule of perpetuities, and that therefore that portion of the will could not be carried into effect. That question was anxiously weighed by Lord *Eldon*, and it is quite impossible to suppose that when the argument was before him, and the duty also devolved upon him of considering how far the trusts were valid, it is impossible, I say, to suppose that he would have made the decree which he did make if he had entertained any doubt whatever upon the point which is made the subject of the present appeal.

Now, Lord *Eldon*, in the language of the decrees of that day, and also of the present, directed that with a particular excep-

(1) Law Rep., 1 H. L., 279.

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tion the trusts of the will should be carried into effect. He declared the will to be well executed, and that the trusts thereof ought to be carried into execution except so far as the will directs accumulation. And after setting forth that portion of the will with a view to exclude it from the operation of the decree, the decree goes on to declare that the Defendant, the infant, *Horatio Francis Kingsford* (the father of this Respondent) is entitled in possession to the rents and profits of the testator's freehold and copyhold and leasehold estates, and the dividends and annual proceeds of the personal estate, for the term of his life, with remainder to the first and other sons of his body lawfully to be begotten successively, according to seniority, and so forth. The rest of the will, therefore, is, in Lord *Eldon's* opinion, as collected from that decree, clearly free from any objection to the validity of the disposition of the personalty — and it is directed to have effect given to it in the manner which I have read.

I think, therefore, seeing that that decree is now more than fifty years old (for the decree was in 1820), and seeing that the estate has been enjoyed for all that time, with reference to that 552] *decree, it might have been as well to arrive at the conclusion that the decree was a bar to the controversy which has now been raised. But, my Lords, as that has not been done, I am not at all unwilling to come to the question of the construction of this will in order to support what plainly, I think, appears from the decree to have been the intention and meaning of Lord *Eldon*.

My Lords, in considering the construction of the will, I have deliberately abstained from making any reference myself to, or even reading, the judgment which I delivered in the Court of Chancery in the case of *Christie v. Gosling*, and also the opinions delivered by noble and learned Lords when that case was considered upon appeal in your Lordships' House. But, considering this case without any prejudice that might have been derived from the perusal of those judgments and opinions, I have come, upon an entirely independent view of the case, to a conclusion that is in harmony with those decisions.

Your Lordships must recollect that the will begins with the creation of a life estate in the sons of the testator's daughter (there were several of those sons) and then it proceeds to give estates tail in remainder to the first and other sons of those

several sons in succession. It is plain, therefore, upon the face of these dispositions, that there would be, according to the intent of the testator, and the operation of his will, several tenants in tail, taking by purchase.

With that fact borne in mind derived from the will, we come to construe the proviso which is annexed to those limitations. The first observation is that the proviso is limited to the personal estate of the testator. The proviso does not control or in any manner alter the limitations in the will of the real estate, but the proviso deals with personal estate alone. The proviso refers to persons taking the real estate under the will; and the question is whether this form of proviso, dealing with personal estate, with reference to the dispositions of real estate, can receive any other interpretation than that which limits the meaning of the proviso to a definition of tenants in tail taking by purchase under the will.

Now the meaning of the words must of course be influenced by the fact of the law upon the subject. The law upon the subject is this: that with regard to personal property, no individual can take *it by descent. In the ordinary meaning [553 of the term real estate is taken by descent, but personal estate cannot be taken by descent. When, therefore, you refer to persons taking as tenants in tail under a will, you must of necessity limit the description to those persons only who take by purchase, for no other persons can be brought within the category, or made by law to answer the description. When, therefore, you come to construe a proviso of this nature, you must bear in mind that the tenants in tail spoken of with reference to the personal estate are such tenants in tail as take by purchase alone. And the object of the testator in a proviso of this kind is perfectly clear, it is to propel the personal estate from one tenant in tail taking by purchase, but who dies under twenty-one, to the next tenant in tail by purchase succeeding him in the order of succession prescribed by the will. It does not at all touch the enjoyment of the tenants in tail of the real estate. It leaves that where it is created by the will; but it takes the tenant in tail taking by purchase under the will, and contemplating the possibility of the first taker dying under twenty-one, it propels the estate from him to the other.

The object therefore of the proviso is in direct conflict with

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the argument which has been urged at the Bar, because the argument at the Bar has been this: You must neglect the proper meaning of the words, and lay aside wholly the object and intent of the proviso, and you must construe the proviso as if it were a thing applied to real estate and not to personal estate. But if it were applied to real estate you find two things required before you arrive at an absolute interest, namely, the attaining of the age of twenty-one, and also the becoming entitled in possession. The Appellants say that "entitled in possession" means the actual receipt of the rents and profits, but they say that with regard to the real estate that may not happen for an indefinite period of time, because the successive tenants in tail of the real estate succeeding one another by descent may, all of them, for a long period of time, die under the age of twenty-one years, and, therefore, without becoming entitled to the actual receipt of the rents and profits. I say, in putting that construction upon the words "in possession," you altogether forget that the proviso is limited to those taking by purchase. 554] And you forget this also, that it is *utterly impossible to speak, with reference to personal estate, of persons taking by inheritance in succession. And therefore you apply a difficulty to this limitation of the personal estate which is derived only from the limitations of the real estate, but to which the law forbids personal estate to be subjected. It is plain, therefore, that if you were to give to the words "in possession" the meaning contended for by the Appellants at the Bar, you would be putting upon those words a sense and an interpretation which not only contradict the object of the proviso, but would be in utter repugnancy with the rest of the directions contained in the proviso.

But now let us see whether the proviso does not bear *in gremic* evidence that it was intended to apply only to those who take by purchase, to whom alone it could be applicable, and not to those who succeeded to the real estate by descent. Now, my Lords, you will observe that the first part of the proviso declares that "such persons as shall under this my will be entitled to the estate tail in possession in my real estate" shall not be absolutely entitled—they are left entitled, but the restriction is upon their being "absolutely entitled." It is evident, therefore, that it was intended to apply to those who would be entitled under the

bequest contained in the will. And the direction only is, that they shall not be absolutely entitled until they attain the age of twenty-one. Well, but is there anything here to render necessary the imposition of this farther condition, that they shall not be absolutely entitled without being also in possession of the rents and profits of the real estate? There is nothing in terms that amounts to that. Can you derive that prohibition from the words "such person or persons as shall under this my will be entitled to an estate tail in possession"? It is clear that Lord *Eldon* felt that difficulty; and as he felt it and dealt with it, it is clear (in confirmation of what I have already said) that his attention was directed to this part of the will, but he did not derive from it any conclusion that rendered it obligatory upon him to declare this portion of the will void for remoteness. It is clear, also, that he held that the words "in possession" must, in order to escape from that repugnancy which I have mentioned, receive a secondary interpretation, which probably they may easily get in connection with the trust for accumulation *and that they did not amount to the imposition of a farther condition in addition to attaining the age of twenty-one, namely, the condition of their becoming entitled absolutely to the receipt of the rents and profits.

And, my Lords, there is another conclusion which forces us I think, to come to that meaning in order to accomplish the very object of the testator. You will be good enough to recollect that in the case of a tenant in tail dying under the age of twenty-one, leaving issue, the estate is transmitted to his issue; but if you were to impose upon that tenant in tail the obligation of having actually got into possession before he had become entitled to the personal estate, the result would be the diversion of the estate. The personal estate would go one way and the real estate would go another way. And therefore you would give to those words "in possession" a meaning that would frustrate the whole object of the testator; for it would render the receipt of the rents and profits an absolute condition of the title to the leasehold and real estate; whereas there is no such condition with regard to the real estate. And the real estate would be transmitted to the son of the tenant in tail dying whilst his estate was yet in remainder, and the personal estate

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having been impressed with that condition would go away to somebody else. But that is not the object. Are we to construe a will containing equivocal words so as to defeat the object of the testator, or are we to give it an interpretation consistent with the object of the testator and consistent with the meaning and intent of the whole of the clause in which the words are found? It is very easy to do so. You will construe, my Lords, these words, "entitled to an estate tail in possession" as meaning that the tenant in tail shall have the *status* of being entitled to the actual pernanancy of the rents and profits of the estates if the antecedent life estate were at that time defunct. And then these words are nothing in the world more than words expressive of that which will be the consequence of attaining the age of twenty-one; that the tenant in tail will become actually entitled to the rents and profits of the estate.

Again, my Lords, it is plain from what has been called the dispositive clauses — not with much correctness, for they are not dispositive, that is left to the previous clause — but they are 556] *expressive of an intent that the leasehold and personal estates shall absolutely belong only to such person or persons as shall first attain the age of twenty-one, and become, that is *and thereby* become, entitled to an estate tail in possession. Therefore the words "in possession" in the will are used only intensively to designate and describe the tenant in tail attaining the age of twenty-one, and by attaining the age of twenty-one being in the position of being entitled to the rents and profits, if the estate for life were at that moment to determine.

I have, therefore, no doubt in recognising again, if it were necessary to do so (which it is not, after your Lordships' decision in *Christie v. Gosling* ⁽¹⁾), the rule laid down in *Gosling v. Gosling*, namely, that these provisions are intended to apply to tenants in tail taking by purchase. For there can be no other tenant in tail of personal estate than he who takes by purchase. I should recognise that rule and apply it, if it were *res integra*, to the interpretation of this will, and I find nothing in the equivocal words "in possession" which takes away the means and the right of applying that rule and which obliges us to convert the whole thing from being a regular and well-ordered dispo-

(1) Law Rep., 1 H. L., 279.

sition into a perfect chaos, and to effect the destruction of the will instead of the interpretation and execution of it.

Lord *Eldon* interpreted it, and directed it to be carried into effect, I think, upon very just and right principles. Your Lordships have still farther declared and expanded those principles in your decision in *Christie v. Gosling* ⁽¹⁾. I think those principles are strictly applicable here, and I think they cannot be thrust out of view by any meaning which can be attributed to these words, "in possession," which words must be construed by the context, and, if necessary, controlled by being made subordinate to the general intent and purpose of the testator in the whole of the will, and particularly in the clause in which these words are found. And the more so, because if you gave them other than a secondary interpretation, if you gave them the meaning which has been put upon them by the Appellants, the result would be that you would defeat the very intent of the testator in the event most likely to *happen by compell- [557
ing the real estate to go one way and the personal estate to go another way.

My Lords, I am happy that you propose to dismiss this appeal without costs. It is a contest between relations. It is a contest over the words of this will. I think this farther discussion ought not to have been made upon it, but inasmuch as it is desirable that these parties should be sent away in a spirit of good feeling towards one another, I think your Lordships have followed former principles and rules quite rightly in coming to the conclusion that this appeal should be dismissed without costs.

LORD O'HAGAN :

My Lords, in this case the questions were originally two, and on both of them judgment was pronounced in the Court below in favor of the Respondent. But subsequent events have rendered the second no longer material, the tenant for life having died, and the Respondent being now actually in possession. This was perhaps the more difficult of the questions, and I am glad that it is no longer in controversy, although if it were I should agree with the conclusion of the noble and learned lord on the woolsock.

On the only point with which we have to deal it appears to

⁽¹⁾ Law Rep., 1 H. L., 279.

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me, in the first place, as was observed by the Vice-Chancellor, that "the intention is perfectly clear," and that we are asked to defeat that intention by reserving his decision. And, in the second place, it is to be noted that the will was manifestly prepared with great care and intelligence, and that the testator appears (as was said by Lord *Eldon* in 1820), to have quite understood the legal distinctions affecting the devolution of real and personal estate. The form of the proviso, whatever may be its legal effect, is demonstrative of this; and it seems to me clear that the effect of its power was to prevent and qualify the operation of the doctrine which vests, absolutely and at once, leasehold and personal estates in persons who would have taken estates tail under the same terms of gift if the subject matter had been realty. So far as the will itself is concerned, if it had stood without the proviso, I apprehend there could have been no doubt that the Respondent, taking the real estates as tenant in tail, would have taken the personal estates absolutely; and 558] that the same form of words applied to each must *have accomplished this diverse operation. The personalty, in this case, appears to have been by far the larger part of the whole property; and the tenant in tail, getting the realty only, with limited rights and conditional succession, would at the same time have been invested with complete dominion, transmissible at his will, over that larger part. The testator appears to me to have sought to avoid this inconvenient inconsistency, as far as he could, and to have striven to do so by limiting and conditioning the right to the personalty through a referential modification of the action of the will in its regard; and not as has been contended for the Appellant, by the making of a new gift or the extension of any right theretofore created. And this seems to be the testing query in the case: Is the proviso merely referential, qualifying and restricting, or are we to deal with it as integral and independent, and creative of a new estate, which cannot be maintained in consistency with the established doctrines of the law?

It was almost admitted that if the first clause of the proviso had stood alone, the case would not have been distinguishable from *Christie v. Gosling* ⁽¹⁾, decided by your Lordships' House, as it appears to me, on reasonable and just considerations, prevent-

(1) Law Rep., 1 H. L., 279.

ing the defeat of a testator's plain purpose without the violation of legal principles. That first clause has a clear and intelligible meaning. The testator knew (as I have said) that the tenant in tail of the realty would under the will be "absolutely entitled to his leasehold and personal estates," at whatever age and under whatever circumstances he should become such tenant, and that there would be no restraint on the devolution of it in a course quite distinct from that in which the realty might run. He wished to apply some such restraint, to some extent at least; and it was provided accordingly that the tenant in tail should not be *absolutely* entitled until the attainment of his majority. He was to have an inchoate title, to be consummated in a certain contingency; and in this declaration the testator only cut down the large operation of the words he had used before. Certainly it would be difficult to say that the Vice-Chancellor was wrong in holding the authority of *Christie v. Gosling* ⁽¹⁾ decisive, if the proviso had gone no farther. Can it be supposed that the testator meant to apply the words "entitled to an estate tail" to an estate by descent or inheritance and not by purchase, at the very moment when he was making a provision which excluded the notion that such an estate tail, as distinguished from the absolute estate which he meant to qualify, existed in the chattel interests which he desired to protect?

If this be so, is not the case nearly identical with that on which the Vice-Chancellor relied, and in which, as here, the tenant in tail would have taken the entire estate in the personality, had not his bequest been contracted by the condition that he should not have it absolutely before he reached the age of twenty-one years? If there was no unwarranted straining of construction there to carry out a manifest intention, none is needed here to attain the same good purpose.

Then, is there anything in the second clause of the proviso which should be taken to make a new estate or designate a new class of persons? I do not think there is. That clause is a mere affirmation of that which was negatively stated in the antecedent words. It only affirms that the leasehold and personal estates shall vest on the condition without the fulfillment of which those negative words declared that they should not

(1) Law Rep., 1 H. L., 279.

vest at all. And I do not see that the mere change in the form of the clauses, their substance and effect remaining the same, advances the Appellant's contention in the least; or that if we can hold, as I think we ought to hold in sustainment of the testator's intention, that the estate tail, in the first part of the proviso, is to be taken as an estate tail by purchase, the same words, in the second part, should not receive the same qualifying interpretation. If they do, *cadit quæstio*; and there is no difficulty in this case more than existed in *Christie v. Gosling* ⁽¹⁾ with reference to any invasion of the law against perpetuity. The words of Lord *Cranworth* in that case ⁽²⁾ seem strictly applicable here. "The object was to restrict and narrow the class who, but for the proviso, would have taken absolutely; not to let in any class of persons who, if there had been no proviso, would have taken nothing."

I do not think that we depart from any sound rule of construction, or force unduly the language of the testator in aid of the presumed intention, when we hold that, acting with a clear 560] conception *of his own purpose, and an intelligent apprehension of legal distinctions, he employed words quite capable of carrying out his views. If he had introduced the phrase "by purchase" into the proviso, as pointing to the particular tenants in tail who should not take the absolute interest which he designed to qualify, no question would have arisen. And does not the law implicitly insert those words making the provision sensible and operative, which, without them, regard being had to the nature of that interest, would have been without relevancy or effect? He meant clearly to affect tenants in tail capable of taking the personalty; and they could only be tenants in tail taking by purchase. We have been pressed by the consideration that, Lord *Eldon* having declared the trusts for accumulation illegal and void, the proviso making the leasehold and personal estates subject to the trusts "hereinbefore declared" is altogether vitiated on that account; but we must remember that there are other trusts quite legal and unimpeachable, and it would be too much to avoid a proviso simply because of its reference to trusts generally, several of which are good, even though one be bad.

After the full discussion the matter has received, I shall not

(1) Law Rep., 1 H. L., 279.

(2) Law Rep., 1 H. L., 292.

farther trouble your Lordships save by saying that I am glad this salutary doctrine, established by the House in *Christie v. Gosling* ⁽¹⁾, has been found substantially applicable to this case, and enables us by its application to avoid the defeat of the purpose of this testator. I think the judgment of the Vice-Chancellor should be affirmed. But, for the reasons which have been given by the noble and learned lords who have addressed your Lordships, I am of opinion that, although the decree of the Court below should be affirmed, it should be without costs.

Decree affirmed; appeal dismissed; costs of the appeal to be paid out of testator's personal estate.

Lords' Journals, 19th April, 1872.

Solicitors for the Appellant: *Wynne & Son.*

Solicitors for the Respondent: *Field, Roscoe Field & Francis.*

(1) Law Rep. 1 H. L. 279.

CASES IN THE PRIVY COUNCIL.

[Law Rep., 4 Privy Council Cas., 194.]

J. C.* Feb. 9, 10, 13, 1872.

[194] *WILLIAM HENRY SMITH, Appellant;
 AND
 THE BANK OF NEW SOUTH WALES, Respondent.
 ———
 THE STAFFORDSHIRE.

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY, IRELAND.

Bottomry Bond to Ship Agents — Agreement not to enforce Bond if Bill of Exchange honored — Port of destination where the Bond became due — Subsequent freight.

A bottomry bond on a ship and freight was given by the master for repairs of the ship (already subject to a mortgage), with an agreement by the bondholder, the ship's agent, that if a bill of exchange, drawn by the master upon the mortgagee, should be duly honored, the bond should not be enforced. The drawee died before the bill was presented, and neither administration nor probate of his will had been taken out, when the holder of the bill, in ignorance of the death of the drawee, presented the bill for acceptance:

Held, that it was not necessary, in order to entitle the bondholder to enforce the bottomry bond, that there should have been such a dishonor of the bill as might have been necessary to give a right of action against a drawee or indorsee [195] of the bill, and it was sufficient that what was the *reasonable course, for the purpose of getting the bill accepted and paid, should have been taken, which, having regard to the circumstances of the case, appeared to the judicial committee to be established; and the bond held good.

The bond on the ship and freight was made absolute on the arrival of the ship at *Callao*, but the bond also hypothecated the freight to be earned by the ship from that place to any other port or ports:

Held, that the bond was good *pro tanto* as to the ship, but void with respect to the subsequent freight earned in the voyage from *Callao* to *England*.

The case of *The Jacob* (1) commented on.

**Present* :—SIR JAMES WILLIAM COLVILLE, THE LORD JUSTICE MELLISH, SIR MONTAGUE EDWARD SMITH, and SIR ROBERT PORRETT COLLIER.

(1) 4 Rob., 245.

THIS was an appeal from the decree of the High Court of Admiralty of *Ireland* ⁽¹⁾, in a suit instituted by the respondents, to enforce payment of a bottomry bond for £3,265, executed at *Melbourne* by *Burrott*, the Captain of the ship *Staffordshire*, on the ship and freight.

The suit was defended by the appellant, a merchant in *London* the owner of $\frac{1}{4}$ ths of the vessels. Captain *Barrett* was the owner of the remaining $\frac{3}{4}$ ths. The bond was executed in favor of Messrs. *Dickson & Williams*, ship agents at *Melbourne*, who afterwards assigned the bond to the respondents. The defendant by his answer, set up as a defence that the bond was given as a collateral security only, for the payment of certain bills of exchange drawn on *C. Gumm*, of the *City of London*, the mortgagee of the ship; that before the bills were presented *Gumm* died; and the answer alleged that shortly after the bills had arrived at maturity the executors of *Gumm* had tendered the amount, but that the offer of payment had been refused. The defendant also alleged, that the amount for which the bond had been given had been raised without pressing necessity, and without communication with the defendant in *England*.

The facts were as follows :

The *Staffordshire* sailed from *London* for *Melbourne*, with a general cargo, and arrived in *Melbourne* on the 4th of June, 1869. The ship was under charter to proceed from [196 *Melbourne* to *Callao*, and there to load a cargo of guano for the *United Kingdom*; but the charterparty was conditional on her arriving at *Callao* before the 30th of September, 1869.

The ship before she sailed from *London* had been mortgaged by her owners, the appellant and Captain *Barrett*, to *Gumm*; and as further security for the advances which *Gumm* had made, the owners, by a Letter, assigned to *Gumm* the freight and earnings of the ship, appointed him their attorney to receive

(1) The appeal came before the Judicial Committee in pursuance of the *Admiralty Court Act (Ireland)*, 1867 (30 & 31 Vict. c. 114), which, by sect. 90, abolishes appeals from the Court of Admiralty to the High Court of Delegates in *Ireland*; and by sect. 91 gives a right of appeal to the Court of appeal in Chancery in *Ireland*, and thence to

Her Majesty in Council; or, in the first instance, direct to Her Majesty in Council. Sect. 105 enacts, that the provisions in the several Acts in force relating to the appellate jurisdiction of Her Majesty's Privy Council in *England*, are to extend and apply to the appeals under that act.

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the freight and insurance moneys, and constituted him ship's husband and sole agent for the ship at home and abroad.

The ship was consigned by *Gumm* to Messrs. *Dickson & Williams*, of *Melbourne*, as ship agents or brokers at that port, and this arrangement was confirmed by the appellant.

After a long voyage, in which the vessel encountered very heavy weather she arrived in *Melbourne* in June, 1869, leaking badly; and it was considered necessary that she should go into dock and be put on a patent slip, to ascertain where she was leaking and for repairs. The captain did not know, and could not have ascertained, what repairs would be required until she had been put on the slip; but he believed that they would not be of an extensive character, and that the freight in his hands, which amounted to over £2,000, would be more than sufficient to pay for all necessary disbursements.

The ship was unable to get on the slip until some days after the 16th of July, which was the English mail day; it was then found that she required extensive repairs, and to be caulked, metalled, and refastened. The repairs were done under the supervision of the surveyors of the chamber of commerce, and the vessel left the slip about the 12th of August.

But the next mail, on the 13th of August, the captain wrote to the appellant, and also to *Gumm*, informing them of the nature of the repairs which had been found to be necessary, and of the probable cost, being about £3,000, and stating to the appellant that he did not know how the money which would be necessary to pay for the repairs and other disbursements of the vessels was to be raised. No reply to these letters could have been received for upwards of four months.

197] *The exact cost of the repairs was not known until the 24th of August, when the Shipwrights' Bill was sent in. The amount of the repairs alone was £3,007. 13s. 1d., and there were other disbursements necessary before the vessel could be sent to sea. At that time a reply to a communication from *Melbourne* to *England* could not have been received much before December, even if such communication and such reply had been forwarded between *Point de Galle* and *England* by telegram. There was no telegraphic communication between *Australia* and *Point de Galle*, and the mail between those places ran once a month only.

The captain then applied to the ship agents, Messrs. *Dickson & Williams*, to advance the amount required, over and above the freight he had in hand. That firm refused at first, but upon the shipwright threatening to arrest the ship and sell her they agreed to advance the money upon a bottomry bond of the ship and freight.

Gumm had transacted business with Messrs. *Dickson & Williams* for many years, and it appeared that in order to serve him Mr. *Dickson* suggested to the captain (after it had been agreed that a bottomry bond should be given) that he would take the captain's draft on *Gumm* for the amount of the bond without premium, charging simply the usual commission, and that if the draft was duly honored instructions should be given that the bond should not be enforced. To this the captain agreed, and upon those terms a bottomry bond was executed on the 7th of September, 1870, for the sum of £3,265. The bond was on the ship and freight, to be earned on her intended voyage from *Melbourne* to *Callao*, and from thence to any other port or ports; and it was stipulated that the bond was to be absolute seven days after her arrival at *Callao*.

Before the vessel sailed the ship's accounts were made out, and the captain drew a bill, at ten days' sight, on *Gumm*, in favor of Messrs. *Dickson & Williams*, for the amount due to them viz. £3,586. 10s. 1d. Afterwards the captain drew another bill for £19. 7s. 5d., the amount of some small accounts which he required to pay. These Bills were negotiated by *Dickson & Williams* with the bank of *New South Wales* in *Melbourne*, and the bond was assigned to the bank as security.

It was arranged between Messrs. *Dickson & Williams* and the Bank, with the knowledge and consent of the Captain, that the *Bond should be sent to Messrs. *Gibbs*, the Agents [198 of Messrs. *Dickson & Williams* at *Callao*, with instructions to take the directions of the *Bank of New South Wales* in *London* (by whom the bills would be presented) as to enforcing the bond. The *Staffordshire* was expected to arrive at *Callao* before the bills reached *London*, and it was, therefore, necessary that directions should be sent out to *Callao* by the first mail after the presentation of the bills in *London*, in order that Messrs. *Gibbs* might know whether or not they were to arrest the vessel under

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the bond. These arrangements were communicated by letter from *Dickson & Williams* to *Gumm*.

The Ship sailed from *Melbourne* to *Callao* on the 11th of September, 1869. Mr. *Dickson* left *Melbourne* on the next day, and arrived in *London* on the 30th of October, 1869.

The drafts reached the respondents' bank in *London* on the 1st of November, 1869, and were presented at *Gumm's* office for acceptance on the same day, but they were returned to the manager of the respondents' bank, with the message that they could not be accepted, as *Gumm* was dead. The death of *Gumm* had taken place on the preceding 12th of October, and as his executors had refused to act, no probate of his will or letters of administration of his estate had been granted.

On the same day Mr. *Currie*, the secretary of the respondents' bank, called at *Gumm's* office and saw a Mr. *Ford*, who had for many years acted as manager of *Gumm's* business, and was then acting for the gentlemen whom *Gumm* had named as his executors. *Ford* then refused to accept the bills.

The bills were again presented through a notary on the same day, and were returned marked "No advice," and were then formally protested.

The next mail to *Callao* was on the 6th of November, and by it the *Bank of New South Wales* advised Messrs. *Gibbs* of the dishonor of the bills and instructed them to enforce the bottomry bond.

The mail to *Melbourne* went on the 5th of November, and by it the protest of the bills was sent out, and notice was given to the bank at *Melbourne* that the bills had been dishonored.

The *Staffordshire* arrived at *Callao* and loaded under her original charterparty, and she secured a freight above the then current rate; she sailed from *Callao* on the 25th of January, 1870, [199] before *the Messrs. *Gibbs* were able to enforce the bond, and arrived at *Queenstown*, in *Ireland*, where she was arrested by the bondholders on the 13th of July, 1870.

On the 28th of April, 1871, the suit came on for hearing in the court below, and the judge (Mr. Justice *Townsend*), in an elaborate judgment, pronounced for the validity of the bottomry bond, referring it to the registrar to take an account, and ascertain the sum due on account of the bond.

The present appeal from this decree was brought direct ⁽¹⁾ to Her Majesty in Council.

Sir *George Honyman*, Q.C., and Mr. *A. Cohen*, for the Appellant :

Contended, that no attempt was made to procure the money, which was absolutely necessary to enable the ship to leave *Melbourne*, on the credit of *Gumm*, or the appellant; that no communication was made to *Gumm* or the appellant, leading to the inference that it would be necessary to hypothecate, and no opportunity had been given to either of them of supplying Messrs. *Dickson & Williams* with the requisite credit of funds, as they would have done; that the fact that no advertisements for tenders were published at *Melbourne*, applied with especial force to the position of the appellant, on the ground, that Messrs. *Dickson & Williams* were ship agents for the ship, and aware of the mercantile position of *Gumm* as mortgagee; that Messrs. *Dickson & Williams*, as agents for the ship, ought to have been cognizant of the amount which was being expended on the repairs of the vessel; and that the terms of the bond, the items for which the same was given, and the maritime premium thereby made payable, were such as to make the bond, under the circumstances, void against Messrs. *Dickson & Williams*, as agents for the ship, and against the respondents, who had no better title. They contended, further, that the bottomry bond was void by reason of Messrs. *Dickson & Williams* having taken the bills drawn by Captain *Barrett* on *Gumm*, or had become void or incapable of being put into suit by reason of Messrs. *Dickson & Williams* having negotiated the bills, and that the agreement and condition upon which the bond was given had been violated by Messrs. *Dickson & Williams* and the respondents. That the bills *were never duly pre- [200
sented nor dishonored; referring to *Van Wart v. Woolley* ⁽²⁾; *The Hero* ⁽³⁾; *Byles* on Bills, pp. 183, 203; *Chitty* on Bills, p. 246 [10th Ed.]; *Bayley* on Bills, p. 219 [5th Ed.]; *Story* on Bills of Exchange, § 372; and submitted, that before the maturity of the bills the amount of the bills was offered to the respondents, who refused to accept the same, except on the

⁽¹⁾ See Foot-note, *ante*, p. 195.

⁽²⁾ 8 B. & C., 439.

⁽³⁾ 2 Dod., 144.

fulfilment of conditions which they had no right to impose; that the respondents, who had no better title than Messrs. *Dickson & Williams*, acted unjustly and inequitably in giving directions that the bond should be enforced, and by refusing to revoke those directions when the amount of the bills was offered to them; and, lastly, they insisted, that the bond could not attach on the freight which was subsequently earned after the bond became absolute. They cited the following authorities: *Parsons on Shipping*, B. I., ch. 6, s. 8, and the authorities there referred to; *The Karnak* ⁽¹⁾; *The Panama* ⁽²⁾; *The Prince of Saxe-Cobourg* ⁽³⁾.

Mr. Butt, Q.C., and Mr. J. C. Mathew, for the Respondents:

Insisted, that the judgment of the Court of Admiralty of *Ireland* was right, as the bottomry bond was shown to have been the primary, and not collateral, security; that the arrangements as to the bills formed no part of the contract upon which the money was agreed to be advanced, and could not control the bond; and that even if it were the duty of the holders of the bills to have the bills duly presented before the bond could be enforced, the condition had been complied with. That the bottomry bond was a valid bond, as it was not reasonably practical for the captain to have communicated with the appellant; and that the judgment of the high court of admiralty of *Ireland* was fully supported by the evidence. They referred to and relied on the following cases: *The Ariadne* ⁽⁴⁾; *Stainbank v. Fenning* ⁽⁵⁾; *Stainbank v. Shepard* ⁽⁶⁾; *The Lord Cochrane* ⁽⁷⁾; *The Tartar* ⁽⁸⁾; *The Huntcliff* ⁽⁹⁾; *The Jacob* ⁽¹⁰⁾; *Parsons on Shipping*, B. I., p. 163.

201] *Their Lordships' judgment was pronounced by

THE LORD JUSTICE MELLISH:

This is an appeal from a decree of the Court of Admiralty in *Ireland*, in favor of a bottomry bond. There is a very elaborate judgment of the learned judge of the court below, and their

⁽¹⁾ Law Rep., 2 P. C., 505.

⁽²⁾ Law Rep., 3 P. C., 199.

⁽³⁾ 8 Moore's P. C. Cases, 1.

⁽⁴⁾ 1 W. Rob., 411

⁽⁵⁾ 11 C. B., 51.

⁽⁶⁾ 13 C. B., 418-441.

⁽⁷⁾ 2 W. Rob., 335.

⁽⁸⁾ 1 Hagg. Ad. Rep., 1.

⁽⁹⁾ 2 Hagg. Ad. Rep., 281

⁽¹⁰⁾ 4 Rob., 245.

lordships do not think it necessary to go minutely into the facts of the case, as far as regards those parts of the case in which they thoroughly agree with that learned judge.

The general facts were, that the *Staffordshire*, which was the ship bound by the bottomry bond, had been previously mortgaged to *Gumm*, and the freight to be earned on the voyage to *Melbourne* and round from *Melbourne* to *Callao* and back, taking a cargo of guano from the *Chinchas* to *England*, had also been pledged by a letter from the owners to *Gumm*, and *Gumm* was to have the appointment of the different persons to whom the ship was to be consigned, the ship agents, so that he might have a control over the freight. He consigned the ship to Messrs. *Dickson & Williams* of *Melbourne*. The part-owner, *Smith*, the Appellant (*Barrett*, the captain, being also a part owner), wrote confirming that appointment, but as there was a considerable sum, more than £2,000, to be received at *Melbourne* for the freight on the outward voyage, it was evidently anticipated at first by all parties that that sum would be sufficient to pay the disbursements in *Melbourne*. The ship having encountered bad weather, on its arrival at *Melbourne* wanted some repairs, and the repairs were commenced; but in the letters which were first written it appeared clearly to have been anticipated that the freight would have been sufficient for the payment of the cost of the repairs. The repairs, therefore, proceeded, and in August the parties were informed that a considerably larger sum was being expended than was anticipated, namely, £2,000. Even at the time when they wrote by the mail in August they do not appear to have made up their minds that any bottomry bond was necessary; but when the repairs of the ship were finished at the beginning of September, and they found that they amounted to upwards of £3,000, then the ship agents said that they could not pay that large sum, which the persons who had repaired the ship were entitled to receive, and in respect of which they threatened *to put [202 the ship into the Court of Admiralty; unless they got a security on bottomry, and on that this bottomry bond was given.

The first question to be considered is, whether the bottomry bond was generally good with reference to the rules which are well established in the courts respecting bottomry bonds. First it was said, that it was not sufficiently proved that it was

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given for necessities; that a large sum appeared to have been expended in repairing the ship. It was also said that the ship had been entirely rebuilt, and that there could only be expended on bottomry a sufficient sum for the repairs that were necessary for the particular voyage. When it is considered that the voyage was to go to *Callao*, and then to the *Chincha Islands*, and take a cargo of guano for *England*, which is notoriously one of the heaviest cargoes that can be obtained and carried by a ship, it is very difficult to suppose that more repairs could have been effected than what would be necessary for the purpose of such a voyage.

But however that might be, it is clear that a very large portion, if not the whole of the sum advanced must have been for necessary repairs. The question of amount is to be referred to the registrar, and, therefore, it is clear the bond cannot be held bad, because it was not taken for necessary expenses.

It is next said, that there was not sufficient evidence that the money could not have been borrowed on the personal credit either of *Gumm*, or the in part shipowner *Smith*, and that there was not sufficient evidence that the master attempted to borrow money on their personal credit. The answer to that appears to be, that there was no power in anybody to pledge the personal credit of *Gumm*. He was not the owner, only the mortgagee of the ship. He had, no doubt, put the ship into the hands of *Dickson & Williams*, the ship agents, but it appears very doubtful, whether his credit could have been pledged even to them, and certainly there is no evidence that he gave *Dickson & Williams* any authority to borrow money on his credit from anybody else. Therefore, it is wholly immaterial that *Gumm* was a person in good credit, because money could not be borrowed on his credit.

As respects the appellant, *Smith*, the shipowner, there is not the slightest reason to suppose that he was a person in any credit at *Melbourne*, and it really appears to their lordships [203] it would *have been perfectly idle to advertise for anybody to lend money on his personal credit, because it was plain that nobody would lend money on such credit.

It was next said, that the master ought to have communicated to *Gumm* and *Smith* in *England*, before he borrowed the money on bottomry. The answer to that appears to be, that

there was really no opportunity of doing it. They did not know certainly before the mail went out in August that it would be necessary to borrow money on bottomry, and it appears very doubtful whether they really knew it then, and whether they fairly knew it before September. But even if it be assumed that they knew it in August, there was no direct communication by telegraph. The message would have had to be sent to *Point de Galle* by steamer, and by telegraph from *Point de Galle* to *England*. Sending in that doubtful way, first writing a letter to the parties to frame the telegram at *Point de Galle*, and then to send it by telegraph, it would have been very difficult to give any thorough account of the state of things; and even if it could be done, it would have taken certainly more than two, and probably full three months before the answer could have been got back.

Under these circumstances it appears to their Lordships, that it was not necessary, it would have been, in fact, very unadvisable, to have kept the ship at *Melbourne* all that time, more particularly as the captain himself, was a part owner, and, therefore, quite as able to judge as *Smith* was, what was desirable to be done; and more particularly also it is to be taken into account that, after all, the parties were not pledged to the bottomry bond because a bill was drawn on *Gumm*, and, which is very material in another part of the case, it was agreed at the time when the bottomry bond was given, that if that bill was accepted and paid when it became due, then the bottomry bond was not to be enforced.

But then it was urged very strongly by Mr. *Cohen* that the law looks with great suspicion upon a bottomry bond given in favour of the ship agents, and that on that account, even although this might have been good if it had been given to some other person, it was not good considering it was given to the ship agents; and some passages were cited from Lord *Stowell's* judgment in the case of *The Hero* ⁽¹⁾, in which he says with respect to an agent, "Cases *may possibly arise in which an [204 agent may be justified in so doing. It can be no part of his duty to advance money without a fair expectation of being reimbursed, and if he finds it unsafe to extend credit to his employers beyond certain reasonable limits, he may then surely

(1) 2 Dol., 144.

be at liberty to hold hard, and to say, 'I give up the character of agent,' and, as any other merchant might, to lend his money upon bond to secure its payment, with maritime interest. If in such a case he gives fair notice that he will not make any further advances as agent and affords the master an opportunity of trying to get money elsewhere, and the master is unable to do so, but is obliged to come back to him for a supply, then, he is fairly at liberty, like any other merchant, to advance the money on a security that is more satisfactory to himself."

It appears to their Lordships, that practically the ship agents in this case did really act and do everything that they were required to do as laid down by Lord *Stowell*, because they did give fair notice to the master that they would not make any further advance. They told the master, "This bill is so very large that we shall not be able ourselves to advance the money to pay it;" and they did give the master the opportunity of borrowing money elsewhere, which does not appear to mean, as was argued, to borrow money upon bottomry elsewhere, but to borrow money elsewhere on the personal credit of the owners.

It is perfectly plain that the master could not borrow money on the personal credit of the owners. Then he comes back to the ship agents. The reason why the law looks with suspicion on money advanced by the agent is, that the agent to some extent, at any rate in most cases, agrees that he will make some advances on the personal credit of the shipowner. The shipowner in ordinary cases has put the ship into his hands and he is dealing with him; but in the present case it would be very difficult to say, that the agents, Messrs. *Dickson & Williams*, at *Melbourne*, agreed to advance one farthing on the credit of *Smith*, the shipowner, the ship really being put into their hands by *Gumm*, the mortgagee. They would have been quite willing apparently to advance money on the credit of the mortgagee, *Gumm*, but then it was doubtful, whether *Gumm's* credit was really pledged. As to *Smith*, they looked upon him as a
205] person of no *credit, and never intended or held out the least in the world that they would advance money to him.

It appears to their Lordships that, under these circumstances, it was a perfectly fair transaction for them to say to the master "You must give us a bottomry bond; but you shall draw a bill on *Gumm*, who is a person in good credit, and who has put

the ship into our hands, and who may be desirous to prevent the bottomry premium being incurred, and so his security on the ship being lessened; he may prefer to pay these expenses rather than to have his security lessened by the bottomry bond being enforced against the ship. Still draw a bill on him, and if he pays that bill well and good; then there will be no bottomry."

It appears to their Lordships that, under the circumstances, that was a perfectly fair mode of dealing on the part of the ship agents, and that it would be wrong to hold that the bottomry bond was bad on the ground that it was given to the mortgagees' agents.

Neither does it appear that there was the least reason to suppose that anybody else would have advanced money on bottomry on the same conditions. Other parties very likely might have been found to advance money on bottomry for the voyage. They would have expected to have obtained their bottomry premium, at all events if the ship arrived, and it is not likely that anybody else would have been content to draw a bill on *Gumm* and take the chance of that being paid, and say, if that is paid, then the bottomry bond is not to be enforced.

Therefore, on this part of the case, their Lordships agree with the judgment of the learned judge in the court below, that the bottomry bond is perfectly valid.

The next, and a very important part of the case is this:—It is said that the bill of exchange was never properly presented, and never properly dishonored, and that the Court of Admiralty in *Ireland*, as a Court of Equity, ought to have prevented the bond being enforced, and ought to have decreed that all that the parties were entitled to was to have the bill of exchange paid.

The circumstances on that part of the case were these: The bill on *Gumm* was drawn at ten days' sight, and there appears to have been a reason why it was drawn on a few days' sight, and why it was important that it should be accepted immediately, *namely, that it was known that the voyage [206 to *Callao* would probably not last very much longer than the time it would take for the bill to arrive in *England*, and that if the ship was to be seized and the bottomry bond was to be enforced at *Callao*, there would be very little time left after the

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bill arrived, before it would be necessary to send out orders from *England* to seize the ship at *Cullao*.

The bill arrived in *England* on the 1st of November, and, unfortunately, *Gumm* had died some weeks before, which has caused the whole difficulty in this part of the case. The bill had been sold to a bank in *Melbourne*, and the bottomry bond had been also deposited with the bank as a security for the payment of the bill, and the bill with the bond had been sent over to the bank's agents in *London*. The bill was sent to *Gumm's* office to be presented in the ordinary way, *Currie*, the manager of the bank, not being aware that *Gumm* was dead. When the person sent comes there, he finds *Ford*, who had been the manager of the business during *Gumm's* lifetime. *Gumm* had been for some time apparently confined to his bed, and *Ford* had had the entire management of his business, and *Ford* is found there. The evidence of the different witnesses do not very accurately agree as to what took place. At any rate, *Ford* would not accept the bill, but he was the person who first gave information that *Gumm* was dead, and that he had left executors. The holder of the bill came a second time, and a third time, and *Currie* went himself, and then notice was given that one of the executors was abroad. He does not appear to have been told who the other executor was, neither did *Currie* inquire. The bill certainly was not accepted, and *Ford* says that he had no authority to accept, and he says he did not lead them to believe that he dishonored the bill on the part of the executors. Their Lordships cannot help thinking that there must have been an impression given to *Currie* that *Ford* did profess to act for the executors, and did tell him that the bill would not be accepted. He told them on one of the occasions that he repudiated the transaction altogether, and thought the bottomry bond was altogether invalid.

This having taken place, a notary is sent. The notary appears not to have been told that *Gumm* was dead, and, therefore, he 207] *merely presented the bill and caused it to be protested in the ordinary way. *Hallett*, one of the persons who had been named in the will of *Gumm* as executor, was living in *London*, and *Ford* communicated with him; therefore, *Hallett* certainly had information that this bill had been presented. He referred them to the solicitors who had acted for *Gumm*, and were ap-

parently acting for the executors. What precisely passed with the solicitors does not appear, but communications were had by *Ford* with *Smith*, or persons acting for *Smith*, for the purpose of endeavoring to raise money for paying the bill, and *Ford* called on *Currie* on the 5th of November, 1869, and left a letter which whether he had authority from the executors or not, professed to be written by the authority of the executors, and asked that the bill should be presented again when it became due. But they did not hold out or make any promise that it would be paid. Then *Currie* told them that the bill would be sent out on the 6th, which was the day when the mail left, which would take the orders to *Callao*; and he told them that, unless the bill was paid that night, unless they produced the cash, he should send out the bond to *Callao* for the purpose of being enforced; and it appears to their Lordships that there was no distinct promise that the money should be paid prior to the time when the bond was sent out.

The main question to be decided really is, whether the bond was sent out too soon. After the bond had been sent out there were a variety of negotiations, and before the time when the ten days and the days of grace would have elapsed; assuming the presentment to have been good, there was a promise that if the bond and the bill were given up the amount of the bill would be paid; but then, the bond having gone out that could not be done, and a claim was made for an indemnity that was refused; and further negotiations went on, and the result was that the parties never agreed.

The question then, is, was the bill presented? Their Lordships think that it is hardly necessary in deciding this case to say, whether the Bill was presented, or that it would have been a good presentment of the bill for the purpose of giving notice of dishonor to prior parties to the bill. There appears to be very little authority indeed as to what is to be done to present a bill under *these circumstances. It is laid [208 down in Mr. Justice *Byles*' book on bills that if the drawee of a bill is dead the party ought to inquire for his personal representative. But in the present case no administration had been taken out, and no will had been proved. Then if a party who presents a bill is informed that there has been a will, and persons named in the will as executors, but who have not taken

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out probate, who have not determined whether they will act or not, is he bound to present it to such a person who may or may not afterwards take out probate, or may or may not afterwards turn out to be executor? There is very great difficulty in that. There seems great difficulty in saying that a person would be bound to take the acceptance of anybody whose authority to give that acceptance, and whose authority as executor, had not been recognized by probate being granted.

Their Lordships do not think it necessary to give a decisive opinion on that question, because they agree with the argument that they have heard that the real question here is, did the parties do, under all the circumstances, what was reasonable for the purpose of getting the bill accepted and paid? Their Lordships are of opinion, that it is clear that if the bill had been presented to *Hallett*, who was the only person named as executor in *England*, it would have had no effect; that he would have refused to accept it, and that presentment to him would not have really made any difference in the case. Look at what the position of *Hallett* was. *Gumm* was not liable for this amount. It would have been a very serious thing indeed for any executor to accept a bill drawn upon his testator for a debt for which his testator was not actually liable. *Hallett* was informed by *Ford* of the bill having been drawn and presented. He referred to his attorney, who afterwards appeared in some of the negotiations, and was present at them. If *Hallett* had already intended to accept it there was ample opportunity for them to have seen and informed *Currie* that the bill would have been accepted; but before the bond was sent out the executors never offered to accept, neither did anybody offer to accept, nor did anybody offer to promise to pay; but all that was said was, "We desire that you should keep this bill for some more days, until in the ordinary course it becomes due, and then present it again." Was 209] *Currie* bound to wait under *these circumstances? Their Lordships think he was not, and for this reason; time was very material. It was known that even if they sent out by that mail it was very doubtful whether the bond would arrive out in time at *Callao* in order to stop the ship. If the ship left *Callao* the consequences would be that it would go to the *Chinchas*, take in a cargo of guano, and there would be all the risk of the voyage from the *Chinchas* to *England*; and moreover, though possibly

the parties did not know that such was the law, the bond having become due, and being forfeited seven days after the arrival of the ship at *Callao*, the bottomry holders would have had no insurable interest on the subsequent voyage.

Under these circumstances it was very material that they should send out the bond by the first mail, and the other parties must have been, or at any rate ought to have been, aware of that.

Therefore, on the whole it appears to their Lordships, that the bond was not sent out too early, that there was no violation of the agreement which Messrs. *Dickson & Williams* had made at the time the bond and the bill of exchange was taken, that they would give the opportunity to *Gumm* of accepting and paying the bill before they would enforce the bond. No doubt it was a misfortune for which nobody was answerable, that *Gumm* happened to be dead. But still their Lordships think, that the bill having arrived, and there being several days during which the bank could get neither acceptance nor payment before the next mail went out, they were justified in sending out orders by that mail with the bond, to have the bond enforced.

The next question to be decided is this: was the bond so drawn as to hypothecate any freight which might be earned between *Cullao* and *England*; the bond was made payable at *Callao*, and it is objected that though the bond may be generally good, yet it is bad as respects subsequent freight. And their Lordships are of opinion, that the bond does not validly hypothecate such freight, although it was admitted that the bond being bad in that respect does not make it entirely bad, but that it is still good as respects the ship. An ordinary bottomry bond beyond all question only pledges the ship, and sometimes the cargo and the freight to be earned on the voyage which is to be accomplished before the *bottomry bond becomes [210 payable; and their Lordships have not been referred to any case in which freight to be earned on a subsequent voyage has been included in a bottomry bond. It was held in *The Jacob* ⁽¹⁾ that the subsequent freight under very peculiar circumstances might be liable, but there is no form of a bottomry bond produced which on the face of it professes to charge and hypothecate the subsequent freight; and their Lordships are of opinion,

(1) 4 Rob., 245.

that subsequent freight cannot be hypothecated, for this reason : That by the very nature of the bottomry bond the person who takes it is to become liable for the maritime risk, and, therefore, nothing can be hypothecated, except something which is in danger of perishing by maritime risk during the time that the bond is running. But here that freight was not begun to be earned, the cargo was not loaded on board until after the bond was forfeited, and when no maritime risk was being run by the person who had advanced his money on bottomry, because the bond being forfeited he already had got the personal security of the master. And, moreover, if there can be a valid pledge of the freight until the bottomry bond holder chooses to seize the ship. It is difficult to see where the end of it would be.

The only case which has been cited was the case of *The Jacob* ⁽¹⁾; it is unnecessary to say, whether that was rightly decided, but it hardly appears to be an authority on the question: for there the subsequent freight had not been hypothecated: but Lord *Stowell* came to the conclusion that by deviating from the proper voyage, and from going away too early, the ship-owner had wrongfully deprived the bottomry bond holder of the freight which really was pledged, namely, the freight to be earned in the current voyage, and that, therefore, it was right, the ship having got away before it could be seized, to hold that the subsequent freight could be seized. Their Lordships give no opinion, whether that was right or wrong, but that case does not appear to be an authority for giving a pledge of the subsequent freight. Their Lordships have come to the conclusion that there was no valid pledge of the subsequent freight.

The question then arises, what ought to be done? Both ship 211] and *freight were seized when the ship arrived at *Cork*. Bail was given generally, and the ship was released, and earned freight subsequently. Then it was said, that because the bail had been given generally, the ship and freight had been released, there could be no subsequent inquiry into the value of the ship and freight; but practically the parties by giving bail must be considered to have agreed that if the bond was held to be valid in any part then the bail would pay the amount of the bottomry bond, which was the amount for which they had

(1) 4 Rob., 245.

given bail. Their Lordships find that that is not the rule in the Admiralty Courts, but that after bail has been given, on a proper case being made out, the Court of Admiralty will go into the question, whether the *res* which was seized — the whole of the property which was attached — was of more or less value than the amount for which bail was given, and if it is found that it is of less value, then the parties will only be obliged to pay the amount of that. That appears to have been decided by Dr. *Lushington* in the case of *The Duchesse de Brabant* ⁽¹⁾; but that was a case of collision. The marginal note is, “The bail is only liable to the extent of the value of the ship and freight, and not for the full amount of the damage done, even although, as in the present case, bail may have been given for a sum beyond the value of the ship and freight;” and there it was decided, that on a proper case being made out, a subsequent inquiry may be made into the value of the ship and freight, notwithstanding bail has been given for a larger sum. If that may be so when both ship and freight are held to be liable, *a fortiori*, their Lordships are of opinion, that it would be the case if the Court comes to the decision that though the ship is liable the freight is not; and, therefore, they are of opinion, that the decree of the Court below ought to be varied by declaring that the bottomry bond was not a valid hypothecation of the freight earned by the vessel on the voyage from *Callao* to *England*, and operated only as a hypothecation of the ship, and by referring it to the registrar to ascertain what was the value of the ship when released. Subject to that variation, the decree of the Court below will be affirmed, but the decree having been varied in a substantial part of the case, their Lordships will humbly report to Her *Majesty that it should [212 be affirmed with that variation, but without costs to either side.

Their Lordships understand that it will be for the convenience of both parties that the cause should be retained in this Court, and that the questions remaining to be determined should come before Her Majesty's Registrar in Maritime causes. This course may, therefore, be pursued.

Solicitors for the Appellant: *Westall & Roberts*.

Solicitors for the Respondents: *Wallons, Bubb & Walton*.

(¹) 1 Sw., 264.

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J.C.* Feb. 14, 15, 1872.

THE OWNERS OF THE SHIP MARPESIA, Appellants ;
AND
THE OWNERS OF THE BARQUE OR VESSEL AMERICA AND HER
CARGO, Respondents.

THE MARPESIA.

[Law Reports, 4 Privy Council Cases, 212.]

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY.

Collision — Inevitable accident, definition of — Onus of proof — Pleadings — Costs.

Inevitable accident is that which the party charged with the damage could not possibly prevent by the exercise of ordinary care, caution, and maritime skill: *The Virgil* (*) followed and approved.

Held, affirming the principles laid down in *The Bolina* (*), that where in a cause of collision the defence of inevitable accident is raised, the *onus* of proof lies, in the first instance, on those who bring the suit against the vessel and seek to be indemnified for damage sustained; and does not attach to the vessel proceeded against until a *prima facie* case of negligence and want of due seamanship is shown.

If a Plaintiff in a collision suit intends to rely upon a particular act of negligence by the Defendant, he is bound specifically to allege that act in his pleadings, and it is not sufficient that the act may be included generally in an allegation in 213] the pleadings, which do not clearly state such particular *act; as it is likely to mislead the Defendant, and prevent his being prepared to meet that particular case.

Two sailing vessels approaching stem on in such a manner as that, under the sailing rules, each would be bound to port, being in a dense fog, only sighted each other at a distance of about two hundred yards. The defendants' vessel, having been close hauled on the port tack, was then preparing to go about, and had eased off her head sheets. Both vessels immediately ported, but came into collision. Only one minute elapsed between the time of sighting and the collision. The Plaintiffs' petition alleged, that the defendants' vessel neglected to port, and it was stated, in answer to a question by the Judge of the Admiralty Court, that the head sheets of the Defendants' vessel were not again hauled aft. On this evidence that vessel was held to blame by the Admiralty Court, on the ground that she had not executed all the proper manœuvres which she might have executed after sighting the other vessel:

Held (reversing the decision of the Admiralty Court), that the collision was the result of an inevitable accident, the defendants' vessel having done all that could be effected by ordinary care, caution, or maritime skill in the short space of time that elapsed; and that the Plaintiffs, if they meant to rely upon the fact that the head sheets had not been again hauled back, ought to have alleged that fact in their petition as the cause of the collision; the allegation of neglect to port not sufficiently indicating the nature of such omission.

It is a rule in the Admiralty Court, in cases where a collision is found to be the result of inevitable accident, to make no order as to costs, unless it can be shown that the suit was brought unreasonably and without sufficient *prima facie* grounds. This rule followed by the Appellate Court: *The London* (*) approved.

*Present: — SIR JAMES WILLIAM COLVILLE, SIR MONTAGUE EDWARD SMITH, and SIR ROBERT PORRETT COLLIER.

(*) 2 W. Rob., 205.

(*) 3 Notes of Cases, 210.

(*) Br. & L., 82.

This was an appeal from a decree of the Court of Admiralty, in a cause of damage civil and maritime, brought by the respondents the owners of the barque *America*, and the owners of her cargo, against the ship *Marpesia*, belonging to the appellants, for the recovery of damages in respect of a collision which happened between the two vessels.

The collision took place at about 10 a.m. on the 21st of May, 1870, in the *St. George's Channel*, near the *Saltees* Light Ship.

The *Marpesia* was prosecuting a voyage from *Liverpool* to *Melbourne, South Australia*, laden with a general cargo. She was a ship of 1,443 tons register, and was 237 feet in length. The wind was about S.W., and until just before the collision the *Marpesia* was sailing by the wind on the port tack, heading about from W. by N., to W.N.W., her speed being about five knots. The *America* was bound from *Queenstown* to *Glasgow* with a cargo of sugar, and was proceeding under all square sail, with a free wind heading about E. by S.

*From the evidence, it appeared that a dense fog pre- [214
vailed at the time of the collision, the utmost distance at which it was possible to see a ship being, according to the evidence of the master of the *America*, about from one hundred to one hundred and fifty yards, and in his deposition before the Receiver of wrecks he admitted, that there was no time to alter sail on either vessel. It was proved on the part of the *Marpesia*, that her helm had been put to starboard for the purpose of putting her from the port on to the starboard tack, and that she was under the influence of her starboard helm, and that her head sheets had been eased off when the head sails of the *America* were seen ahead emerging through the fog, and that the helm of the *Marpesia* was immediately put hard aport, but that the collision nevertheless occurred, the jibboom of the *Marpesia* passing over the *America*, and the stem of the *Marpesia* taking the port side of the *America*.

The defence relied on by the appellants was that the collision was the result of inevitable accident.

The judge of the court below (The Right Hon. Sir *Robert Phillimore*) held that the *Marpesia* was solely to blame, as she ought to have hauled aft her head sheets and let go all the lee braces, and pronounced the *Marpesia* to blame for the collision.

The appeal was from this decree.

Mr. *Butt*, Q.C., and Mr. *E. C. Clarkson*, for the Appellants :

Our contention is, that the evidence established the fact that the collision was the result of inevitable accident, and could not have been avoided by the exercise of ordinary care, caution, or

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maritime skill by either vessel: *The Virgil* ⁽¹⁾. There was no negligence on the part of the *Marpesia*. It was proved that, in the state of weather, the *America* was seen by us as soon as it was possible for those on board the *Marpesia* to discern her, and that immediately proper measures were taken to avoid a collision, though the time proved insufficient to prevent it: *The Lochlibo* ⁽²⁾. Owing to the short distance at which the *America* was sighted, it was impossible for the head-sheets, of the *Marpesia* to have been hauled in time, or to haul her aft head-sheets, as this was a part of the manœuvre of porting her helm, and 215] would have assisted the ship in more *effectually answering her helm: and the ground on which the judgment of the judge of the admiralty proceeds is, that we did not do that which was not in our power to have done, to make our vessel answer her helm after porting, and so avoid the collision. Therefore, he erroneously concluded that we did not obey the steering and sailing rules, art. 11, by porting helm in time, for which negligence he held the defendants liable. This point, however, was not raised by the pleadings or insisted on in the argument, but alone was suggested by the court. If the plaintiffs intended to raise such a point, or to rely on it, they were bound to have stated it in their pleadings, so as to give the defendant an opportunity of meeting such an allegation by evidence. The court below was not entitled to give judgment on an issue not raised by the pleadings: *The Ebenezer* ⁽³⁾; *The Speed* ⁽⁴⁾. The plaintiffs were bound to prove their case *secundum allegata et probata*: *The North America* ⁽⁵⁾; *The Ann* ⁽⁶⁾.

Mr. Milward, Q. C., and Mr. A. Cohen, for the Respondent:

First, it was proved by the evidence, that the *America* was not in any way to blame for the collision, and that the collision was not, as alleged, an inevitable accident by reason of the *Marpesia* being in stays, or otherwise. She was bound to have assisted her helm by hauling in her head-sheets and letting her lee braces go. It is alleged in the pleadings, that the *Marpesia* neglected to port her helm. That allegation refers not merely to the act of putting her helm to port, but includes all other measures which a seaman would, in the exercise of nautical skill, adopt for the purpose of throwing his ship's head to starboard, and so assisting his port helm. It was not necessary to allege in the pleadings in specific terms that the *Marpesia* neglected to do this, or to let her lee braces go. Secondly, with respect to the doctrine of inevitable accident: the rule at Common Law

(1) 2 W. Rob., 201-205.

(2) 3 W. Rob., 310-318.

(3) 2 W. Rob., 296-209.

(4) Ibid, 225-227.

(5) 12 Moore's P. C. Cases, 331.

(6) 13 Moore's P. C. Cases, 198.

is, that a plaintiff is bound to give *prima facie* proof that the defendant is guilty of negligence, even where the defence of inevitable accident is set up, and not until that fact is established is the *onus* of proof shifted to the defendant; but a different rule prevails in the Admiralty Court — when inevitable accident *is pleaded, it is the practice for the defendant to [216 begin, and the *onus* is, therefore, thrown upon them. The Appellants are bound, therefore, to satisfy the Court that they did all they could to avoid the accident, and we contend that they have failed to do so. Thirdly, with respect to the default of the appellants, we contend that the evidence shows that there was a want of ordinary care and nautical skill on the part of the *Marpesia*, in not taking the proper steps, as pointed out in the judgment of the Court below, to avoid the collision. Even if the decree of the Court below should be reversed, the respondents ought not to be condemned in costs, as they had good grounds for instituting the suit: *The London* (1); *The Ilmerant* (2).

Judgment was pronounced by

SIR JAMES COLVILLE :

This is a case of collision brought by the owners of the barque *America* against the owners of the ship *Marpesia*, the *America* having been run down by the *Marpesia* in *St. George's Channel*, on the 21st of May, 1870. The points raised by the appeal lie in an extremely narrow compass. It is admitted, on all hands, that the collision took place in daylight, about ten o'clock in the morning, but in a very thick fog, in which the vessels could only discern each other at a very short distance.

It is found by the learned Judge of the Admiralty Court, that the distance at which they could have been visible to each other, was not more than from two hundred and fifty to three hundred yards.

It is now admitted on the side of the *Marpesia*, that no blame is attributable to the *America*; and it would further appear that neither in the Court below, nor now, is it seriously contended, that the *Marpesia* was in fault in any of the particulars which are specially stated in the petition of the *America*, unless it be in one to be afterwards considered. It is no longer contended, that she was proceeding at an improper rate of speed considering the state of the weather; or that a good look-out was not kept on board that vessel; nor is it now contended, that her helm was improperly starboarded, or that she made default in not keeping out of the way of the *America*, as she was bound to do.

(1) Br. & L., 82.

(2) 2 W. Rob., 236.

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217] *The only point which is now made on behalf of the respondents is, that it cannot be said that those on board the *Marpesia* did not make default in not porting the helm of their vessel within the proper sense to be attached to those words.

The clear and admitted facts of the case seem to be these: the vessels were proceeding one down the *Irish Channel* and the other up the *Irish Channel* in a thick fog. They could not have seen each other at a distance of more than three hundred yards. Their Lordships are rather disposed upon the evidence to say, that three hundred yards is an extreme limit, and that the distance within which each vessel was visible to the other was probably nearer two hundred yards. The combined speed of the vessels would seem from the evidence to have been about eight knots an hour, and the result of this state of things is, that not more than a minute, if so much as a minute, must have been the time which elapsed between the sighting of the two vessels by each other and the actual collision.

It is further admitted, that the two vessels were proceeding in such a manner as that, under the sailing rules, each would be bound to port its helm; that they were in fact approaching each other stem on.

It is also established by the evidence, that immediately before the *Marpesia*, which had been close hauled on the port tack, sighted the *America*, she was proceeding to tack. It may be a question how far she had gone in that manœuvre, but she had put down her helm, and had come up two or three points, and was in the act of altering her rigging in order to complete the operation of tacking. When, however, the two vessels sighted each other, her helm was shifted, and put, as they were bound to put it, hard-a-port.

In that state of things, what is attributed to the *Marpesia* by the judgment, and substantially the only fault that has now been imputed to her at the bar, is that she did not do something more than port her helm; that she did not take steps, which it is assumed she might have taken, in order to put the foresails into such a position that the full pressure of the wind whilst she was under the port helm would come upon them; and also to ease the pressure of the wind upon the after sails of the vessel; the result of which operation would have been that she would have 218] paid off *more rapidly under the port helm than she did; and in that way, as it is contended, might have gone clear of the *America*.

The finding of the learned judge in the court, below on this point is in these words:—“Now, she ported her helm, but I am instructed by the elder brethren that if she had accompanied that manœuvre by hauling aft the head-sheets again, and letting

go all the lee braces (and it is to be observed that all her hands were on deck at the time), in all probability she would have avoided the collision, and at all events have placed herself in a position of having done all in her power to prevent the accident. Not having done so, I must hold, that she failed to execute the proper manœuvres, which after sighting the *America* it was competent for her to have executed, and, therefore, that she is to blame for this collision."

It is to be observed that the judge does not in terms find that the collision would have been avoided if she had done that which it is stated she omitted to do. His finding is only that, in all probability, she would have avoided the collision, and that at all events she would have been in a position in which her owners might have said more unanswerably, that she had done all in her power to prevent the accident.

As far as their lordships can see, the negligence thus imputed was not made a point in the suit, until the learned judge, acting upon the advice of the elder brethren, gave his judgment. The omission is not expressly alleged in the pleadings as a culpable omission on the part of the *Marpesia*. The respondents' counsel contended that it is included in the allegation that she did not port her helm, because they urge that if she had done what she omitted to do to her sails, she would have answered the port helm more efficiently. But it appears to their lordships that, if that was the case intended to be made, the pleadings ought to have stated it, and not having done so it was likely to mislead the parties and prevent their coming to meet that case.

Nor do their Lordships find that the point was really raised by the cross-examination. There was, no doubt, a good deal of cross-examination of the captain and one of the other witnesses as to the discrepancies between the evidence they gave at the hearing and the statements in the log, as to what had been done with the cross-jack yards and other parts of the rigging; but it seems to their Lordships that that cross-examination was directed rather to show *that the ship was not, as had [219 been stated in the log, and in the case originally put forward by the captain, almost at rest as if she had been at anchor, and that the operation of the tacking had gone so far that she might be said to be technically "in stays," and, therefore, not under control; and, consequently, that the cross-examination was directed to show that there was a greater speed upon her than was admitted. The only place in which their lordships can find that the point was directly raised in the evidence, was in the examination by the court, not of the captain, but of the mate, and there no doubt, the court asks the question, "Were the head-sheets let go?" The answer is, "eased off." That

would only go to show what was the state of the vessel at the time. The Court then goes on to ask, "And when were they hauled back again?" The answer is, "never hauled back at all, not until we struck." If that omission were intended at the time to be treated as culpable negligence, one would have expected that the examination would have been continued in order to give the parties an opportunity of explaining the fact. But as far as their Lordships can see, it was mainly on these questions and answers that the elder brethren suggested, and the learned judge found, that there had been a culpable omission on the part of the *Marpesia*.

In consequence of one of the arguments at the bar, it seems desirable to say something as to the burthen imposed upon a vessel that seeks to excuse itself for a collision on the ground of inevitable accident.

The respondents' counsel suggested that there is some difference of practice between the Court of Admiralty and the courts of common law in that matter. Their lordships, however, cannot find that there is any such difference. They take the law as they find it laid down by Dr. *Lushington* in two cases.

In the case of *The Bolina* (¹), Dr. *Lushington* says: "With regard to inevitable accident, the *onus* lies on those who bring a complaint against a vessel, and who seek to be indemnified, on them is the *onus* of proving that the blame does attach upon the vessel proceeded against; the *onus* of proving inevitable accident does not necessarily attach to that vessel; it is only necessary when you show a *prima facie* case of negligence and want of due seamanship."

220] *Again in the case of *The Virgil* (²), the same learned judge gives this definition of inevitable accident: "In my apprehension, an inevitable accident in point of law is this; viz., that which the party charged with the offence could not possibly prevent by the exercise of ordinary care, caution, and maritime skill. If a vessel charged with having occasioned a collision should be sailing at the rate of eight or nine miles an hour, when she ought to have proceeded only at the speed of three or four, it will be no valid excuse for the master to aver that he could not prevent the accident at the moment it occurred; if he could have used measures of precaution that would have rendered the accident less probable."

Here we have to satisfy ourselves that something was done or omitted to be done, which a person exercising ordinary care caution and maritime skill, in the circumstances, either would not have done or would not have left undone, as the case may be. Their Lordships, considering the admitted time which

(¹) 3 Notes of Cases, 210.

(²) 2 W. Rob., 205.

clapsed after the two vessels had sighted each other to have been not more than a minute, and the state in which the *Marpesia* was, in attempting to go about, have failed to come to the conclusion that the captain was to blame for having omitted to do that which the judgment seems to find that he might have done. It is a question entirely of navigation, and, therefore, it is one upon which they have felt at liberty to consult the nautical assessors who assist their Lordships; and they have been confirmed in the opinion, which they would have formed themselves from all the circumstances of the case, it being the opinion of those gentlemen that the time was so short that the omission to do that which has been said ought to have been done with the rigging and the sails cannot be imputed as negligence, or anything approaching to negligence, in the master of the *Marpesia*. It may be observed that this view of the case is in some measure confirmed by a statement of the master of the *America*, who in his examination before the receiver of wrecks, said, "There was no time to alter sails on either vessel, and the only precautions were confined to the helm."

Their Lordships having, for these reasons, come to the conclusion that the collision in this case was one of those unfortunate accidents in navigation which no ordinary care, caution, or *maritime skill could have prevented, are compelled to [221 dissent from the finding of the learned judge of the admiralty that the *Marpesia* was solely to blame. They will, therefore, humbly recommend her majesty to allow the appeal, to reverse the judgment of the Court below, and to dismiss the suit.

With regard to the question of costs, their lordships have considered the matter. They find that in the case of the *London* (*) Dr. *Laushington* stated: "In this case the Court has found that the collision was an inevitable accident, and pronounced against the damages; and the only question now is, whether the plaintiff ought to be condemned in costs. I quite agree with Mr. *Brett* that on principle costs ought to follow the event;" (that is also their lordships' view); "but if there is any set rule of practice, it is necessary to abide by that. I have caused inquiry to be made, and I find that in these cases of inevitable accident the usual practice, the general rule I may call it, has been to make no order as to costs, as I had occasion to state in the *Itinerant* (2). But looking to all the cases, it is clear that the Court still holds, and will on occasion exercise, a discretionary power to condemn in costs. Thus, in the *Thornley* (3), I ordered the plaintiff to pay costs, saying that he had no sufficient ground for bringing his action. I deem myself, therefore, free to consider the circumstances of the case, and I must say

(*) Br. & L., p. 82.

(2) 2 W. Rob., 236.

(3) 7 Jur., 650.

that, considering the collision took place on a most tempestuous night, a night in which in this one place eight vessels were wrecked, the plaintiff had good reason to think the collision was a mere accident which could not have been avoided, and that he was unduly rash in bringing his action."

Their lordships, therefore, conceive that the general rule of the Court of Admiralty is in these cases to make no order as to costs, and that in order to justify an exception to that rule it must be shown that the action was brought unreasonably and without sufficient *prima facie* grounds. In the present case they cannot say that there were not such grounds. The case is one in which the unsuccessful party might fairly suppose there was ground to impute blame to the other, and seek to have that question tried. Therefore, there will be no costs in the Court 222] below; and as the *party came here to support the decree which he had obtained, there will be no order as to the costs of this appeal. The order, therefore, which their lordships will recommend her majesty to make is that the appeal be allowed, that the decree of the Court of Admiralty be reversed, and that in lieu thereof a judgment be made declaring that the collision was the result of inevitable accident, and ordering that the suit be dismissed without costs, and that each party do bear their own costs of this appeal.

Proctors for the Appellants: *Pritchard & Son.*

Solicitors for the Respondents: *Wallons, Bubb & Wallon.*

J.C.* March 22, 1872.

THE AUSTRALASIAN STEAM NAVIGATION COMPANY, Appellants;
AND
WILLIAM HENRY MORSE AND GEORGE PHILIP MORSE,
Respondents.

[Law Reports, 4 Privy Council Cases, 222.]

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Sale of goods of an absent owner by master of vessel—Where and under what circumstances justifiable—What constitutes "necessity" in cases of this kind defined.

The authority of the master of the ship to sell the goods of an absent owner is derived from the necessity of the situation in which he is placed; and, conse-

*Present:—SIR WILLIAM COLVILLE, THE LORD JUSTICE JAMES, SIR MONTEAGUE EDWARD SMITH, and SIR ROBERT PORRETT COLLIER.

quently, to justify his selling, he must establish (1) a necessity for the sale; and (2) inability to communicate with the owner. Under these conditions, and by force of them, the master becomes the agent of the owner not only with the power, but under the obligation (within certain limits) of acting for him; but he is not, in any case, entitled to substitute his own judgment for the will of the owner, in selling the goods, where it is possible to communicate with the owner.

The possibility of communicating with the owner depends on the circumstances of each case, involving the consideration of the facts which create the urgency for an early sale, the distance of the port from the owner, the means of communication which may exist, and the general position of the Master [223 in the particular emergency.

Such a communication need only be made when an answer can be obtained, or there is a reasonable expectation that it can be obtained, before the sale. Where, however, there is ground for such an expectation, every endeavour, so far as the position in which he is placed will allow, should be made by the Master to obtain the owners' instructions. *The Bonaparte* (1), and *The Cargo ex Hamburg* (2), recognized and followed.

THE action out of which this appeal arose was brought in the Supreme Court of *New South Wales* by the respondents against the appellants. The respondents by their declaration alleged in the first count the conversion by the appellants of nineteen bales of wool, the property of the respondents, and in the residue of the declaration sued for money had and received, and for money due on account stated. The appellants pleaded to the first count that the wool was shipped on board of a vessel of the appellants called the *Boomerang*, to be carried from *Rockhampton*, in the colony of *Queensland*, to *Sydney*, and there (excepting certain perils and casualties of the sea and navigation) delivered to the plaintiffs; that the ship in the course of her voyage stranded, and the wool became saturated with sea water; that the appellants were compelled to take it back to *Rockhampton*, and there, after survey, sold it, as the only proper or safe course to pursue in its then state, for the benefit of the plaintiffs. To the residue of the declaration the appellants pleaded payment into Court of £124. 1s. 6d.

The plaintiffs replied to the first plea; first, joinder of issue; second, that the wool might at small expense have been dried and repacked, and forwarded to *Sydney*; and third, as to the second plea, that the money paid into Court was not sufficient.

Issue was joined on the replication.

The action was tried by a special jury before Sir *Alfred Stephen*, Chief Justice, when evidence (part of which had been obtained on commissions to examine witnesses in *England* and in *Queensland*, in one of other actions brought by other owners of the wool, and was, by consent of the parties, read as evidence in the action) was given to the following effect:

The plaintiffs were wool producers in *Queensland*, at a station *120 miles inland from *Port Mackay*, and in the month of [224

(1) 8 Moore's P. C. Cases, 450.

(2) 2 Moore's P. C. Cases (N.S.), 280.

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December, 1865, nineteen bales of wool were sent to them to *Rockhampton*, a distance southward of about 250 miles, and at the latter port were transhipped by their agent on board the steam-vessel *Boomerang*, belonging to the appellants, for conveyance from *Rockhampton* to *Sydney*, in the colony of *New South Wales*, a further distance of above 900 miles. The bales were consigned to Messrs. *Willis, Merry, & Lloyd*, merchants in *Sydney*, for the purpose of shipment to *England*.

The nineteen bales formed portion of a cargo comprising 260 bales of wool, or thereabouts, consigned to nineteen separate consignees in *Sydney*, and four parcels deliverable to order.

The *Boomerang* on her voyage, about forty-five miles from *Rockhampton*, struck upon a rock and filled, and the whole of her cargo became submerged, and more or less damaged by sea water. The cargo was thereupon, with great labor, taken out of the *Boomerang*, transhipped in a steam vessel, the *Yaamba* sent from *Rockhampton* for the purpose, and brought back to *Rockhampton*. In the course of transshipment from the *Boomerang* many of the bales of wool unavoidably burst open, and the wool belonging to different consignees became mixed, and the wool on its return to *Rockhampton*, to which place it was conveyed with reasonable despatch, was dirty and stank, and was heated and in danger of ignition. The weather was rainy, and there were no stores in the town of *Rockhampton* in which the wool could have been unpacked and dried, and the wool was in immediate peril of increased and serious damage. Under these circumstances, at the instances of the master, assisted by the advice of the appellants' agent at *Rockhampton*, the wool brought back there was surveyed by *Charles Haynes Morgan*, *Lloyds'* agent there, together with Captain *Robert Miller Hunter* of the same place, merchant, who reported that the wool was becoming rapidly heated, and was in such a condition that it could not be reshipped with safety, and recommended that it should be sold immediately; whereupon, and owing to the urgency of the case, the cargo, with the exception of two or three parcels, was, by the direction of the captain of the *Boomerang*, sold at public auction by the appellants' agent.

225] *At the trial the judge submitted the following written questions for the determination of the jury:—First, was the wool in such a state that it could be safely conveyed to *Sydney*? Second, could the defendants, with the means obtainable by them, have dried, repacked, and forwarded the wool to the port of its destination? Third, if they could have done this at all, could they have done it without incurring an expense considerably exceeding the amount of freight? Fourth, did the defendants, time and circumstances considered, act for the best, and

as wise and prudent men, for the interest of the plaintiffs? Fifth, had the defendants, considering all the circumstances of the case, time and opportunity to obtain instructions from the owners? Sixth, was the master of the vessel a participator in the proceedings thus taken, or a consenting party to such proceedings.

The jury answered the first, second, third, and fifth of the above questions in the negative, and the fourth and sixth in the affirmative; and thereupon a verdict was entered for the appellants.

The respondents obtained a rule *nisi* to set aside the verdict and for a new trial, on the grounds of misdirection and that the verdict was against the weight of evidence, which was made absolute on the 7th of March, 1870, Sir *Alfred Stephen*, the Chief Justice of the Court who tried the case, dissenting from the opinion of Justices *Hargrave* and *Cheeke*, who formed the majority of the Court.

The appellants being dissatisfied with the judgment of the majority of the Supreme Court, making absolute the rule *nisi*, presented a petition to the Court, praying for leave to appeal to Her Majesty in council against the rule, which was refused, and the appellants' petition discharged with costs, on the ground, that the rule or order did not involve directly, or indirectly, any claim respecting property of the value of £500 sterling. The total amount, however, which the plaintiffs in the several actions sought to recover as damages from the defendants (the appellants), was for the value of 103 bales of wool, estimated at the sum of £1,750 and upwards.

The appellants afterwards presented a petition to Her Majesty in council praying for special leave to appeal against the judgment of the Supreme Court; and on the 19th of July, 1870, special leave was allowed, although under the appealable value, as the case involved an important point of mercantile law.

*Sir *R. Palmer*, Q.C., and Mr. *T. D. Archibald*, for the [226 Appellants:

The judgment of the Supreme Court, making the rule *nisi* obtained by the respondents for a new trial absolute, was erroneous, and ought to be reversed, and the rule discharged. The questions put to the jury by the Chief Justice on the trial were the proper points for their determination, and the answers given by the jury to them severally and distinctly were conclusive. The real question involved was, whether there was such a pressing necessity for the sale, having regard to the nature and condition of the cargo, as justified the sale, and the jury very properly determined that question in the affirmative. The jury found

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that the defendants could not dry and repack all the wool; the sale, therefore, was inevitable, and, in the circumstances, justifiable, without communicating with the consignees: *The Grati- tudine* ⁽¹⁾; *The Karnak* ⁽²⁾; *The Bonaparte* ⁽³⁾; *The Cargo ex Hamburg* ⁽⁴⁾.

Sir John Karlake, Q.C., and Hon. A. Thesiger, for the Respondents:

The verdict was clearly against evidence, as well as law; and the jury were misled by the questions put to them and directions of the learned Chief Justice on the trial. The necessity for the sale was not put to the jury, but explained by the Chief Justice to have been "highly expedient." That was a misdirection. Neither was the attention of the jury directed to the state of the specific bales of wool belonging to the plaintiff, as distinguished from the other bales belonging to other consignees. The cases cited by the appellant show that the necessity must be absolute to authorize the master selling the cargo. There was, moreover, a fatal omission in not communicating with the owner or consignees of the cargo, which the master could have done: *The Lizzie* ⁽⁵⁾; *Atkinson v. Stephens* ⁽⁶⁾; *Ewbank v. Nutting* ⁽⁷⁾; *Freeman v. The East India Company* ⁽⁸⁾.

Judgment having been reserved, was now delivered by
SIR MONTAGUE SMITH:

This action was brought to recover the value of nineteen bales of wool shipped by the plaintiffs at a port in *Queensland*, on 227] board *the defendants' vessel, to be carried to *Sydney*, and which were sold by the master at an intermediate port.

The defence is, that the sale was justified by the necessity of the situation in which the master was placed with reference to the cargo.

The plaintiffs, who were the owners of the wool, shipped it at *Port Mackay* in a general ship of the defendants, called the *Williams*, for *Sydney* via *Rockhampton*, and consigned it to Messrs. *Wil- lis, Merry, & Co.*, who were their agents at *Sydney*. At *Rockhampton* the wool was transhipped in usual course into another steamship of the defendants, the *Boomerang*. The cargo consisted in all of about 260 bales of wool, belonging to different owners, consigned to nineteen different consignees at *Sydney*; besides some parcels deliverable to order.

On her voyage from *Rockhampton*, and about forty-five miles from that port, the *Boomerang* struck on a rock, and filled; the whole of the cargo was submerged and damaged.

(1) 3 Rob., 240.

(2) Law Rep., 2 P. C., 505-512.

(3) 8 Moore's P. C. Cases, 459.

(4) 2 Moore's P. C. Cas. (N.S.), 289-320.

(5) Law Rep., 2 A. & E., 254.

(6) 7 Ex., 567.

(7) 7 C. B., 797.

(8) 5 B. & A., 617.

The ship stranded on Thursday, the 21st of December, and the cargo was taken out of her and brought back to *Rockhampton*. The greater part of it was landed on the 22d and 23d of that month. On the latter day the wool was examined by surveyors; after the survey, the master determined to sell, and, on Saturday, the 23d, he advertised the sale for Tuesday, the 26th. These general facts do not seem to be disputed, and it is not alleged that the master did not use proper care and diligence in discharging the wool, and in having it examined and surveyed.

The complaint is, that he was not justified by any necessity in selling the wool, and taking on himself to do so without communication with the owners.

The case was tried at *Sydney* before the Chief Justice and a special jury, and the verdict passed for the defendants.

There was conflicting evidence at the trial as to the extent and nature of the damage done to the wool, and its condition.

It appeared from the evidence that many of the bales had burst, and the wool had become intermixed; that a great number of bales were heated; that in some fermentation had begun, which, if unchecked by speedy treatment, would destroy the staple of the wool in a few hours, or at most in two or three days. Evidence *was also given that, to save wool in [228 this condition from destruction, various processes were necessary, viz., unpacking, washing in fresh water, drying, pressing, and repacking in fresh packs, and that facilities could not be obtained by the master in the small town of *Rockhampton* for this treatment; and, in fact, that no person could be found to undertake the work, even if he had been disposed to pay the heavy expense of it.

There was some opposing evidence on these points; but, after the verdict, it may be taken that the jury gave credit to the case of the defendants, which was, in substance, that the sea damage had brought the cargo into a state in which it could neither be carried on nor stored, and that it would in two or three days have lost nearly all value unless it could at once be treated in the way above described; that such treatment could not practically be obtained on a large scale, and that, consequently, there was no other course to be taken for the benefit of the owners, than to sell the wool in parcels to numerous purchasers, who might be able, individually, to apply the proper treatment to their small lots.

The verdict having passed for the defendants, a rule *nisi* was granted to set it aside, and for a new trial, on the grounds of misdirection and that the verdict was against the evidence.

This rule was made absolute by two judges of the Supreme Court of *New South Wales*; the Chief Justice, who tried the ac-

tion, dissenting; and this judgment is the subject of the present appeal.

The general principles of law are not in dispute, viz., that the authority of the master of a ship to sell the goods of the absent owner is derived from the necessity of the situation in which he is placed; and, consequently, that to justify his thus dealing with the goods, he must establish (1) a necessity for the sale; and (2) inability to communicate with the owner, and obtain his directions. Under these conditions, and by force of them, the master becomes the agent of the owner, not only with the power, but under the obligation (within certain limits) of acting for him; but he is not, in any case, entitled to substitute his own judgment for the will of the owner, in the strong act of selling the goods, where it is possible, as hereafter explained to communicate with the owner, and ascertain his will.

229] *The summing up of the Chief Justice was impugned on the ground that the learned judge did not bring these principles with sufficient distinctness to the attention of the jury: and it was alleged that they were misled by the way in which the case was left to them.

The first specific objection was to the Chief Justice's explanation of the word "necessity;"—it was referred to in the judgment of Mr. Justice *Hargrave*, who said that he considered the jury to have been misled by two circumstances; first, by the explanation of "necessity," as being only equivalent to "a high degree of expediency," "highly expedient," &c.; and, secondly, by the fourth written question, viz., whether the defendants had acted "as wise and prudent men."

It appears that the Chief Justice did use the expressions thus quoted; but to ascertain in what sense they were used the other parts of his summing up must be looked at. The Chief Justice, after stating the circumstances which would create a necessity for selling, goes on thus:

"But it is only in cases of the most pressing necessity that the master can thus take upon himself to act for the owners of the cargo; and if he does this without such a pressing necessity, he and his owners will be responsible, even though he may have acted in perfect good faith." Then follow the passages complained of:

"This necessity is equivalent, for the purposes of the present inquiry, to a high degree of expediency; in other words, that course which was clearly highly expedient will be considered to have been pressingly necessary." And, at the conclusion of his summing up, he says, "the master cannot dispose of it in any way unless under such a necessity as that already mentioned, and where he can hold no correspondence with the owner."

The learned judge, after these observations, left some specific questions on the facts, which the jury found for the defendants, and added the question (No. 4), to which objection is made; "did the defendants, time and circumstances considered, act for the best, and as wise and prudent men, for the interest of the plaintiffs?" which the jury answered in the affirmative.

The learned judges of the Supreme Court, who criticised the *Chief Justice's explanation of "necessity," did not at- [230 tempt themselves to define it. It has, undoubtedly, been employed in cases of this kind to express the urgency of the occasion which must exist to justify the act of the master — but the word "necessity," when applied to mercantile affairs, where the judgment must, in the nature of things, be exercised, cannot of course mean an irresistible compelling power — what is meant by it in such cases is, the force of circumstances which determine the course a man ought to take. Thus, when by the force of circumstances a man has the duty cast upon him of taking some action for another, and under that obligation, adopts the course which, to the judgment of a wise and prudent man, is apparently the best for the interest of the persons for whom he acts in a given emergency, it may properly be said of the course so taken, that it was, in a mercantile sense, necessary to take it.

The Chief Justice appears to have directed the jury substantially to the above effect. He repeatedly told them that they must be satisfied of "the necessity," "the pressing necessity," for the sale. In adding, "which means that the course taken must be clearly highly expedient," it cannot be presumed that he intended the jury to understand, that, if the sale was merely expedient, the master would have been right in resorting to it, nor can it be supposed the jury so understood the charge. It could not properly be predicated of the sale that it was "clearly highly expedient" if a better course could have been found. Considering, therefore, the language of the charge as a whole, and the terms of the fourth question, their Lordships think the jury were led to consider the right question (so far as the point now under discussion is concerned) viz., whether there existed a necessity for the sale as the best and most prudent thing to be done for the interest of the owner of the goods.

A sale of cargo by the master may obviously be necessary in the above sense of the word, although another course might have been taken in dealing with it; for instance, if in this case the wool, which had no value but as an article of commerce, could have been dried and repacked, and then stored or sent on, but at a cost to the owner clearly exceeding any possible value of it to him when so treated, it would plainly have been the duty of the *master to sell, as a better course for the [231

interest of the owner of the property, than to save it by incurring on his behalf a wasteful expenditure. In other words, a commercial necessity for the sale would then arise, justifying the master in resorting to it.

It was further objected, on the argument at this bar, that the attention of the jury was not sufficiently directed to the condition of the specific bales of wool of the plaintiffs as distinguished from the rest; but it seems to their Lordships that their attention must have been directed to the plaintiffs' wool, although, no doubt, from the circumstances of the case, the trial took very much the shape of an inquiry into the state of the entire cargo as a mass. Both sides appear to have gone into the whole matter, and the evidence of witnesses taken in another action with reference to another part of the cargo was by consent read on this trial. It is plain that the ship was a general ship; that the wool belonged to numerous owners; that all of it was more or less damaged, and that some of it was so intermixed as to render it difficult within the time at the master's disposal, and the small resources of the port, to deal with the bales separately; these facts must, properly, have had great weight with the jury, when they came to consider what it was practicable for the master to do with such a cargo, and the different parcels of which it was composed.

Their Lordships have now to consider the objections made to that part of the direction of the learned judge which related to the obligation of the master to communicate with the owners.

It is not disputed that the Chief Justice pointedly called the attention of the jury to this obligation. He told them that the master could not sell the goods "unless under such a necessity as that already mentioned, and where he could hold no communication with the owners." And after this explanation he put as the fifth question to the jury, "had the defendants, considering the circumstances of the case, time and opportunity to obtain instructions by the owners?" telling them their verdict must be for the plaintiffs if they found that question in the affirmative, whatever their opinion on the other parts of the case might be.

The possibility of communicating with the owners must, of course, depend on the circumstances of each case, involving the consideration of the facts which create the urgency for an early [232] *sale; the distance of the port from the owners; the means of communication which may exist; and the general position of the master in the particular emergency.

Such a communication need only be made when an answer can be obtained, or there is a reasonable expectation that it could be obtained, before the sale. When, however, there is ground

for such an expectation, every endeavour, so far as the position in which he is placed will allow, should be made by the master to obtain the owner's instructions. (See the judgment of this board by the Lord Justice *Knight Bruce* in the case of *The Bonaparte* ⁽¹⁾; the corrected passage is given in the report of *The Cargo ex Hamburg* ⁽²⁾.)

In the present case the sale, if justifiable at all, must have taken place speedily, for the perishable condition of the wool, which alone justified the master in selling, made it necessary there should be an immediate disposition of it; and the jury, in affirming the necessity of the sale, must be taken so to have found.

The plaintiffs themselves were the owners of the wool. They had shipped it on their own account for *Sydney*, where it was to be transhipped to *England*. They lived at an inland station, and no means existed for communicating with them before the sale; and upon these facts it was scarcely contended by the learned counsel at the bar, that the owners themselves could have been communicated with.

The master did apply to Messrs. *Rca & Co.*, who acted for some purposes as the agents of the plaintiffs at *Rockhampton*, to take the wool on their behalf, but they declined to interfere with it, or with the master's discretion.

The principal contention on this part of the case was, that the master ought to have communicated with Messrs. *Willis & Co.*, the consignees at *Sydney*, or used some endeavours to do so.

In the absence of evidence to the contrary, the presumption would properly arise that the consignees named in a bill of lading had an interest in the goods, and ought to be communicated with; but in the present case it is clear that Messrs. *Willis & Co.* had no interest in the wool, and were to act only as the agents of the plaintiffs at *Sydney*. The obligation, therefore, to communicate *with them appears to their Lordships [233 to depend on two questions of fact:

First, whether, from the nature of their agency, they were such agents as ought to have been communicated with; and, if so:

Second, whether there was time and opportunity, under the circumstances, to consult them before the sale.

With regard to the first of these questions, it is certainly strange, if the obligation to consult Messrs. *Willis & Co.* was intended to be relied on, that although Mr. *Morse* (one of the plaintiffs) and Mr. *Willis* (the agent) were both examined *vivâ voce* at the trial, no information whatever was given by them of the nature and scope of this agency. The fair inference arising from this abstinence, and from the evidence afforded by the

(1) 8 Moore's P. C. Cases, 459, 473.

(2) 2 Moore's P. C. Cases (N.S.), 320.

letters of Messrs. *Willis & Co.*, showing what they actually did in the subsequent part of the transaction, as well as from the general course of business with regard to wool consignments, seems to be, that Messrs. *Willis & Co.* were shipping agents, employed to forward the wool to *England*, and that they were not the general agents of the plaintiffs, nor clothed with any authority to act for them in dealing with the wool before its arrival at *Sydney*, and on an emergency of this kind; but, at all events, the nature and character of the agency was, in their Lordships' view, a question of fact for the jury; and it may be assumed, that a special jury of merchants of *Sydney* were thoroughly competent to deal with it.

On the second question, viz., whether communication with Messrs. *Willis & Co.* was practicable, some of the circumstances to be considered were, that the wool was landed and surveyed on Saturday, the 23d of December, and that, on its state being ascertained, an immediate sale was resolved upon as being necessary, and fixed for Tuesday, the 26th (the intervening days being Sunday and Christmas Day), and at once advertised. The ship was a general ship; there were twenty-three consignees, most of them at *Sydney*, each having an equal right to the time and consideration of the master. *Sydney* is 900 miles from *Rockhampton*. No letter could have reached that place. There was, however, telegraphic communication between the two towns; and much conflicting evidence was given as to the possibility of corresponding by means of it, especially on Sunday and Christmas day.

234 *There can be no doubt that the master is bound to employ the telegraph as a means of communication where it can be usefully done; but, in this case, the state of the particular telegraph, the way it was managed, and how far explanatory messages could be transmitted by it, having regard to the time and circumstances in which the master was placed, were proper subjects to be considered by the jury, together with the other facts, in determining the question of the practicability of communication.

It was contended for the respondents that, although the above two questions of fact may have arisen on the evidence, yet that the attention of the jury was not sufficiently directed to them. Their Lordships have not had the advantage of seeing the whole of the summing up of the learned judge; but it is apparent from the course of the trial, that the jury must have been led to consider them. A great deal of evidence was given, as to the state of the telegraph, and the habits of business of the merchants of *Sydney*, with the sole object of showing the practicability of communication with Messrs. *Willis & Co.* It appears also from

the record that, at the very end of the case at the trial, the counsel for the defendants objected to the Chief Justice, that if the plaintiffs insisted that it was the master's duty to have consulted "the consignees or the plaintiffs," the facts out of which the duty arose should have been specially replied. The Chief Justice overruled the objection, holding that a special replication on the record was not necessary. This discussion clearly shows that the question as to communication with the consignees was an issue, not only raised, but regarded by the Chief Justice as one to be decided by the jury. In truth, they must have had the point present to their minds during most of the trial, and must have considered it as involved in the question submitted to them.

Undoubtedly, if the Chief Justice ought to have told the jury that, in point of law, the master was bound to communicate with the consignees, his direction might be successfully assailed; for he did not so direct them: but their Lordships think that in this case the learned judge could not properly have taken upon himself so to rule as a matter of law, and, on the contrary that the questions of fact before referred to were within the proper province of the jury.

*A further objection is made to the Judge's summing-up, [235 on the ground that he told the jury "in effect" that, if the master could not communicate with all the owners of the cargo, he might sell without communicating with any. If the learned Judge had really so directed the jury, as a matter of law, their Lordships would have considered that his direction was erroneous; because, undoubtedly, each owner has a right to the consideration of the master, and, acting as his agent, he should do his best to communicate with him. In the case of an owner who might be near, and easily got at, it certainly would not alone be a sufficient excuse for not communicating with him, that others at a greater distance could not be consulted. But it has not been shown to their Lordships that the Chief Justice did lay down any such proposition of law. He certainly directed the attention of the jury to the facts that the cargo was a general one, belonging to numerous owners, and the difficulty of communicating with all, as circumstances which would, in fact, increase the embarrassment in which the master was placed. Their Lordships consider that the learned Judge was justified in so doing. A merchant knows when he embarks his goods in a general ship that they cannot have the undivided care and attention of the master. It is obvious, when such a ship is in distress at a distant port, from whence communication with all the owners is impossible, and with any of them difficult that the task of selecting (where all are entitled to consideration) those

with whom he can and should communicate, must add greatly to the master's labors, and might in some cases require an amount of time and attention which he could not give unless he neglected more pressing duties connected with saving and dealing with the goods. Such a state of things, when it exists, is clearly within the range of the circumstances which the jury may properly be directed to consider in estimating the conduct of the master.

On the whole, therefore, their Lordships have come to the conclusion that the misdirections imputed to the Chief Justice have not been established, and that the rule for setting aside the verdict ought not to have been made absolute on that ground.

The Chief Justice, who tried the cause, reports that he is satisfied with the verdict, and, therefore, with regard to that part of the rule which seeks to set aside the verdict on the [236] ground that it is *against the weight of evidence, their Lordships, in accordance with the ordinary rule, would not be disposed to disturb the verdict on that ground unless it appeared to them to be clearly wrong. Their Lordships need only say that they have not been led by the discussion of the case to this conclusion; and, in the result, they will humbly advise Her Majesty to allow this appeal, and to order that the rule making absolute the rule *nisi* for a new trial be set aside, and the original rule be discharged with costs. The appellants will have the costs of this appeal, and the deposit made by them as security for costs will be returned to them.

Solicitors for the Appellants: *Hill & Son.*

Solicitors for the Respondents: *Wilde, Wilde, Berger, & Moore.*

J.C.* April 19, 20, 23, 1872.

ABRAHAM DENYSSEN, AS SECRETARY OF THE SOUTH AFRICAN ASSOCIATION FOR THE ADMINISTRATION AND SETTLEMENT OF ESTATES. Appellant;

AND

SYBRAND JACOBUS MOSTERT, Respondent.

[Law Reports, 4 Privy Council Cases, 236.]

ON APPEAL FROM THE SUPREME COURT OF THE CAPE OF GOOD HOPE.

Cape of Good Hope — Roman-Dutch Law — Husband and Wife — Community of Goods — Mutual Will — Revocation by Surviving Spouse — Adiation — Acquiescence.

Exposition and effect of the Roman-Dutch Law prevailing in the *Cape of Good Hope*, in respect to a mutual will made by husband and wife.

First, such mutual will is to be construed as a separate will; the disposition of each spouse being treated as applicable to his or her half of the joint property.

*Present:—SIR JAMES WILLIAM COLVILLE, SIR MONTAGUE EDWARD SMITH, and SIR ROBERT PORRETT COLLIER.

Secondly, each spouse is at liberty to revoke his or her part of the will during the co-testator's lifetime, with or without communication with the co-testator, or after the co-testator's death.

The power which a surviving spouse has to revoke a mutual will, as far as affects half of the property, is taken away upon the concurrence of two conditions: (1) where the will disposes of the joint property on the death of the survivor, the property being consolidated into one mass for the purpose of a joint disposition of it; and (2), if the survivor has accepted some benefit under the will.

A mutual will made by husband and wife having community of goods, providing for payment of debts, with provision for children with grandchildren, and nominating sole and universal heirs:

Held, to be revocable by the surviving spouse, who had not adiated or accepted the provisions therein given, so far as affected her property, and that she was entitled to claim her half of the inheritance.

THIS appeal was brought from a judgment of the Supreme Court of the colony of the *Cape of Good Hope*, in an action wherein the appellant, in his capacity of secretary of the *South African Association* for the administration and settlement of estates, was plaintiff, and the respondent was defendant.

The appellant sued for and on behalf of the association as the cessionaries of a mortgage bond or deed of hypothecation, dated the 11th of November, 1859, executed by the respondent in favor of one *Cornelis Mostert*, sen. (since deceased), for securing payment of the sum of £3,750, with interest.

Cornelis Mostert, sen., the mortgagee, was the husband of *Elizabeth Jacoba Mostert née Louw*, to whom he was married in community of property. He was the owner and cultivated a farm near *Cape Town*, called "*Valkenberg*." Becoming advanced in years, he quitted agricultural pursuits, and sold his farm *Valkenberg* by public sale to the respondent, who was his nephew and his son-in-law, having married *Isabella Petronella Hester*, one of his daughters. After the sale, the respondent, in the year 1856, became insolvent, according to the law of the colony of the *Cape of Good Hope*; not having paid the purchase money for the farm *Valkenberg*.

Becoming certificated in the year 1859, the respondent was enabled by an arrangement between him and *Cornelis Mostert* sen., and *Sybrand Jacobus Mostert*, sen., the respondent's father, to remain or become again the proprietor of the farm. Under this arrangement, and for securing the purchase money, the respondent, by his attorney, executed in favor of *Cornelis Mostert*, sen., the mortgage bond or deed of hypothecation of the 11th of November, 1859, sued upon by the appellant.

By this bond the respondent hypothecated the farm *Valkenberg* for securing the sum of £3,750, and for interest thereon at the rate of 6 per cent. per annum, with arrears of premiums of assurance which might be due by the respondent on the premises hypothecated, and after engaging to keep the

buildings thereon insured against fire, the respondent thereby authorized *Cornelis Mostert*, sen., to pay the premiums of insurance, in the event of the respondent not doing so.

Sybrant Jacobus Mostert, sen., became by this bond bound in *solidum* as surety for and joint principal debtor of the above capital sum, and interest as might become due thereon.

On the 31st of August, 1860, *Cornelis Mostert*, sen., and *Elizabeth Jacoba*, his wife, made together, in the manner customary in the colony of the *Cape of Good Hope*, a mutual will.

This will made before a notary public, was in Dutch, the language spoken by the testators and their family. It declared their will to be :— First, to bequeath, as prelegacy, to the survivor of them (with liberty to accept such legacy or not) the garden or estate then occupied by the testators, called *Welgedaan*, with all fixtures thereon, and everything which might be brought under the denomination of movable property, trinkets, and cattle, and which might be, at the death of the first dying testators, upon or in any part of the garden or estate, and in any of the buildings erected thereon, and which belonged to the estate of the testators, and all that together, for a sum of £3,000 sterling, to be by the survivor of the testators brought into the estate of the first dying of the testators for the same. Secondly, the testators bequeathed (after the death of the survivor of them) to be paid out and satisfied : to their grandchildren, *John Bernard* and *Cornelis Mostert Bernard* (being children of their then deceased daughter, *Elizabeth Christina Mostert*, procreated in marriage with *Jan Fredrik Bernard*), jointly the sum of £300 sterling ; to their daughter *Maria Carolina Mostert*, married to *Jan Fredrik van Renen*, the sum of £300 sterling ; to their son, *Adriaan Sybrand Mostert*, a sum of £300 sterling ; to their son, *Tobias Cornelis Mostert*, a sum of £300 sterling ; to their daughter, *Isabella Petronella Hester Mostert*, married to the respondent, *Sybrand Jacobus Mostert*, jun., a sum of £300 sterling ; to their daughter, *Jacoba Anna Mostert*, married to *Jacobus Johannes Meintjes*, a sum of £300 sterling ; and to their son, *Jan Fredrik Mostert*, a sum of £300 sterling ; with the stipulation, that in
[239] *case one or more of the above named legatees (all of whom were likewise instituted as heirs under the will) should offer any opposition to any one of the stipulations attached to their institution as heirs, and connected therewith, such legatee or legatees thus opposing the same as heir or heirs should forfeit all his, her, or their right or title to his, her, or their legacy ; and every such legacy was, with regard to such legatee or legatees offering opposition as heir or heirs, revoked by the will, with further stipulation, that every such forfeited and revoked legacy should be considered as belonging to and forming part

of the estate, and should serve to increase the inheritance of the heirs generally.

Proceeding to the appointment of heirs, the testator appointed as their sole and universal heirs:—First, the survivor of the testators; second, their son, *Cornelis Mostert*; third, the children of their daughter, *Elizabeth Christina Mostert*, procreated in marriage with *Jan Fredrik Bernard*; fourth, the daughter of the testators, *Maria Carolina Mostert*, married to *Jan Fredrik van Reenan*; fifth, the son of the testators, *Adriaan Sybrand Mostert*; sixth, their son, *Tobias Cornelis Mostert*; seventh, their son, *Johannes Andreas Mostert*; eighth, their daughter, *Isabella Petronella Hester Mostert*, married to the respondent, *Sybrand Jacobus Mostert*, jun.; ninth, the daughter of the testators, *Jacoba Anna Mostert*, married to *Jacobus Johannes Meintjes*; and tenth, the son of the testators, *Jan Fredrik Mostert*, in equal shares, and in case of predecease of one or more of them, their lawful descendants by representation *per stirpes*; and in all the goods and effects relinquished by the testators' inheritances and successions, nothing in the world excepted; subject, however, to certain stipulations therein specified⁽¹⁾; and appointed as executors, testamentary administrators of the estate, and guardians of the minor, and *fidei commissary* heirs, the testator's wife and the appellant association, reserving "to themselves the power and right thereafter to make such alterations or additions to that their will as they might wish or desire, either at the foot thereof under their own signature, or by separate deed," a power which they exercised by executing a codicil the year following regarding the share for excess of inheritance that should fall to their daughter, *Jacoba Anna Mostert*, *by reason of the stipula- [240
tions in the will contained, which such codicil declared, should remain burthened with the entail of *fidei commissum* with all the stipulations and conditions attached to the same.

The testator, *Cornelis Mostert*, died on the 15th of December, 1862.

His widow, the surviving testatrix, together with the appellant association, her co-executors, on the 23d of December, 1862, deposited the joint will and codicil with the master of the Supreme Court in the colony, and obtained from him the usual certificate or letters of administration, certifying that she and the appellant association had been duly appointed executors testamentary, and authorizing them as such to administer her husband's estate.

On the 21st of January, 1863, the widow *Mostert*, in exercise of the option given to her by the joint will of the 31st of August, 1860, wrote to her co-executors declining to accept the pre-

(1) Set forth *in extenso* in the judgment, *post*, pp. 247-8.

legacy of *Welgedaun* and the moveables there, for which the price would have been £3,000, to be brought by her into her husband's estate. By this letter she gave directions for the sale, in March, 1863, of the entirety of the prelegacy for the account of the estate, with the exception of some of the moveable articles which she wished to keep out for herself. She also gave directions with reference to a sale by her late husband of a piece of land with buildings thereon, in *Breda Street*, to their daughter, *Jacoba Anna Mostert*, for £1,500, desiring that this sale should be completed, and the whole purchase money secured to her husband's estate, and all costs paid out of his estate. She also gave directions for the sale of the different shares in certain companies which had been found in the estate and were set forth in an inventory, except one share in the appellant association. This excepted share she desired might be taken over by her son, *Jan Fredrik Mostert*, at the value then set upon it in the books, without any premium.

The appellant association, acting on their own behalf as well as for the widow, as executors, did not confine their administration to the estate of the husband (*i. e.* the half of the joint estate), but included the whole of the joint estate, and from June, 1864, to February, 1868, intitled their liquidation and distribution advertisements *and accounts, as relating to the estate of *Cornelis Mostert*, sen., and his surviving widow, or as relating to "the joint estate of the late *Cornelis Mostert*, sen., and his surviving spouse, *Elizabeth Jacoba Louw*, as relinquished by him according to mutual will of the 31st of August, 1860." The sum claimed and deducted by the widow and the appellant association, her co-executors, for the commission allowed by the colonial law to executors for administering the estate was calculated on the whole of the joint estate of the testator.

The sales by the appellant association of the property, moveable and immoveable, of the joint estate, were effected partly before the widow's letter of the 21st of January, 1863, and partly in the month of December, 1863, and were principally made in the interval between the 21st of January and the 28th of August, 1863.

On the 28th of August, 1864, the widow, by an instrument as co-executrix testamentary with the appellant association of her deceased husband, ratified and declared her approval of every thing which had already been done and performed by the appellant association in the administration of the estate of *Cornelis Mostert*, sen., and which should thereafter be done and performed, and she thereby also granted full power and authority to the appellant association in her own name, and also as acting for her, to make transfer and conveyance to the respective purchasers of immoveable property from the estate.

On the 18th of September, 1863, the widow addressed a letter to her co-executors, the appellant association, repudiating for the first time the mutual will of herself and her husband.

The present action was then brought by the appellant as representing the association against the respondent for the payment of a balance of principal and other moneys due on the mortgage of the 11th of November, 1859, as having been ceded and transferred on the 6th of October, 1864, by private contract by the appellant association on behalf of themselves and their co-executrix, the widow, to the appellant association for value received.

The respondent in his plea insisted on the joint will as, in effect, releasing him from the whole debt, except only *the [242 interest during the widow's life of the unsatisfied part of the capital.

The appellant association replied, in effect, that unsecured debts only were referred to by the joint will, and that the widow had rejected the benefits conferred on her by the joint will, and that the respondent had acquiesced in her repudiation, and was, at all events, liable to pay a moiety of the debt as belonging to the surviving spouse.

It appeared that large sums had been advanced by the testator, *Cornelis Mostert*, sen., to several of his children, but none to the respondent or his wife; and that the executors in their accounts had treated the respondent as entitled to the benefit of the provisions of the joint will as to the debts due to the testators from their children. The respondent, though familiar with the Dutch language, alleged that both the will and the accounts rendered by the executors were unintelligible to him. The executors in their liquidation account set aside a fund, which was held by the appellant association, to answer the seven legacies of £300 each at the death of the surviving testator, out of the joint estate, with interest from the day of the death of the testator, *Cornelis Mostert*.

The cause was heard without a jury, on the 14th, 15th, 16th, 17th, and 22d of June, 1869, before the Chief Justice, Sir *Sydney Bell* and *Fitzpatrick* and *Denyssen*, Puisne Judges of the Supreme Court, and the majority of the Court, Mr. Justice *Denyssen* dissenting, on the 16th of November, 1869, declared and adjudged: first that the mortgage bond of the respondent for £3,750 sterling, upon which the appellant sued, constituted a debt within the meaning of the several clauses of stipulations of the mutual will of the 31st of August, 1860, having reference to debts due by the instituted heirs, of whom the respondent, as married in community of property to *Isabella Petronella Hester Mostert*, was in law one. Secondly, that the respondent was entitled in this action to assert his legal rights as such instituted

and indebted heir under the mutual will aforesaid, and was not estopped or debarred by reason of acquiescence, or supposed acquiescence, in anything inconsistent with those rights; such acquiescence, or supposed acquiescence, having taken place under circumstances which disentitled the appellant to rely upon 243] the same *as a waiver by the respondent of any of his rights. Thirdly, that the surviving widow, *Elizabeth Jacoba Mostert*, was not entitled to claim, in manner and form as she claimed, and was allowed to claim, a right to take and receive a free half of the joint estate which had been in community between herself and her deceased husband; but, on the contrary, that *Elizabeth Jacoba Mostert* was bound and obliged, as regarded her half of the joint estate, to give effect to all the clauses and stipulations contained in the mutual will of the 31st of August, 1860, having reference to debts due by the instituted heirs. Fourthly, that according to the true intent and meaning of clauses and stipulations, the respondent's inheritance from and out of the estate of the deceased testator was to be deducted from the principal and interest of his debt, being first applied in payment of arrear interest; that the respondent remained liable to pay the surviving widow for her life, interest upon the unsatisfied balance remaining due upon the debt after such deduction; that when the widow should die the inheritance of the respondent from and out of her estate was to be again compensated by, or set off against, an equal amount of the debt then remaining due; and that in case the last mentioned inheritance should be less than the debt, the debt should be wholly freed and discharged from liability for any deficiency which might appear or exist. Fifthly, that the appellant association, as the cessionaries of the debt due by the respondent, took the place of the widow, and were entitled to whatever rights belonged to her as a surviving spouse, bound by the clauses and stipulations of the mutual will, but not to any other or greater rights. Sixthly, that it be referred to the master to take an account of balance or sum still due by the respondent upon his debt after deduction, first, of his counter claim of £42 sterling; second, his wife's paternal inheritance, as such inheritance would have existed after giving effect to the clauses and stipulations of the mutual will aforesaid, relative to debts due by the instituted heirs; and third, after deduction of a certain payment of £1,176 sterling made by the father of the respondent, who was a surety for debt, and an account of such interest, if any, as was then due and owing by the respondent upon the balance of his debt after such deductions, and that the appellant, as such cessionary 244] as aforesaid, should *take judgment in convention for the amount of such interest as found by the master with costs.

From this judgment ⁽¹⁾ the present appeal was brought.

Sir *R. Palmer*, Q.C., Mr. *Rigby*, and Mr. *Wyburgh* (of the *Cape of Good Hope* bar), for the Appellant :

The first question that arises is one of acquiescence on the part of the respondent. The acts of the appellant association were throughout *bonâ fide* ; the respondent acquiesced in those acts after he knew, or at least had the fullest means of ascertaining, all the rights he now insists on, and he is precluded and estopped from setting up those rights against the appellant. The association whom the appellant represents would not have taken over, as they did, for full and valuable consideration, the mortgage bond in question, until the alleged rights of the respondent had been disposed of, had the respondent given them, as he was bound to have done, due notice of such claim. But the second question is the really important one, involving as it does not only the power by the law in force in the *Cape of Good Hope*, of making a joint will, but when such a will has been made by husband and wife, having community of goods, whether it is competent for the wife, if she survive her husband, to repudiate her share in the mutual will, and assert, as she has done in this case, her common law rights, as unaffected by it. To claim, in fact, and exercise authority over one half of the estate which had belonged in community to her late husband and herself ; and thus claim, as she has done, one half of the mortgage debt due by the respondent. Now, we contend, that by the Roman-Dutch law, which is the law in force in the *Cape of Good Hope*, the widow, the surviving spouse, was not bound by the mutual will, and had a right to revoke it, so far as related to her own property, and to claim half of the property of her husband and herself. By the Roman-Dutch law a mutual or joint will is really two wills on one paper : *Van der Linden*, Inst. of the laws of *Holland*, B. I., ch. ix., sec. III., pl. 5 [*Henry's* translation, p. 120] ; *Grotius*, Intro. to Dutch Jurisprudence, B. II., ch. xvii., *sec. 24 ; *Van der Berg's Nederlândsh Advoys* [245 *Boek*, vol. II, *Consultatus*, 210 ; *Hollandsche*, vol. IV., *Cons.*, 43 ; *Peckius, de Testam. Conjug. Lib.* I., c. 43 ; *Van der Keessel. Thes.* 298, Bk. II., ch. xvii., sec. 24 [ed. 1858 by *De Wal*] ; *Voet. Lib.* XXIII., tit. 4, s. 63 ; *Ib. Lib.* XXVIII., tit. 3, s. 11. From these authorities it appears that the husband and wife may both make their testaments in one and the same paper writing, but the paper is considered to contain two separate testaments, which each of them may afterwards alter separately, and without the knowledge of the other, before as well as after the death

(1) See report of case, 2 Buchanan's Cape of Good Hope cases, pp 286, 300.
former branches of the case, 1 Bucha-

of either of them: *Burge*, Com. on Col. and For. Law, vol. iv., p. 404, where all the authorities are collected. *Brits v. Brits' Executors* (1); *Hofmeyr v. De Wet* (2), relied upon in the Court below, were cases of adiation, or acceptance of benefit by the survivor under a mutual will: *Oosthuysen v. Oosthuysen* (3) was also a case of adiation and acceptance by the wife of the benefits of the joint will: *Scorey's Executors v. Scorey* (4). Here, though there was a common testamentary intention, there was not a testacy by one upon the property of the other by consent either express or implied. But, even if the respondent was not estopped by acquiescence, and if the effect of the will, regarded as the will of the testator, *Cornelis Mostert*, sen., amounted to a discharge of so much of the testator's half of the debt as should prove to be in excess of the paternal inheritance of the respondent's wife, the appellant association, as taking the place of the surviving widow, and as entitled to her rights in regard to such mortgage debt, are entitled to claim from the respondent one half of such debt, as remained due at the date of the testator's death, namely, the sum of £1,875, with interest thereon from the 15th of February, 1861.

Sir John Karlake, Q.C., and Mr. H. W. Bush, for the respondent:

The real question in this case is, whether, this being a joint and mutual will made by husband and wife in community of goods, the wife was capable of repudiating her part in it, and [246] having *survived her husband, could repudiate her share and interest in it. Now, the cases referred to on the other side—*Hofmeyr v. De Wet* (1), *Brits v. Brits' Executors* (2), and *Oosthuysen v. Oosthuysen* (3)—and attempted to be distinguished from the present, decide that if two spouses make two wills in one instrument, in themselves separable so far as language goes, but apparently make the one in consideration of the other; and the one gives the other benefits which by the Roman-Dutch law he or she, but for the will, would not be entitled to, and that one survives and take those benefits, the survivor cannot repudiate the mutual will, but must abide by it; and the mutual will, so far as it affects the interests of the survivor, becomes his or her irrevocable will. Here we contend, that the two spouses did in effect consolidate their estates so as to render these joint instruments, even if considered as two wills, incapable of separation the one from the other. The debts due to the joint estate of the husband and wife were in the absolute disposal of the hus-

(1) 1 Buchanan's Cape of Good Hope Cases, 51.

Cases, 312.

(2) Ibid, 317.

(3) 1 Buchanan's Cape of Good Hope

(4) Menzie's Cape of Good Hope Rep. Book 2, p. 231.

band; and by their mutual will they not only disposed of the matter of those debts, but regulated the disposition of their common estate for the benefit of their children. The wife surviving could not revoke their mutual will so far as regarded her share of the common estate, there being nothing in the will of the nature of a *donatio* from her to her husband: *Peckius, de Testam. Conj. lib. I. c. 43*; *Van der Linden, Inst., B. I., ch. ix., pl. 5, p. 129*; *Grolius, Intro. to Dutch Law, B. II., ch. 17, s. 24*; *Ib. B. I. ch. v., s., 25*; *Van der Keessel Thes. 298, B. B. II., ch. xvii., s. 13*; *Dekker, Diss. Jur. lib. I. and VI. ch. 1*; *Van Leeuwen, Censura Forensis, B. III., ch. 11, s. 7*; *Van Leeuwen, Comm. on Roman-Dutch Law, B. II., ch. 3, s. 8* are authorities, by the Roman-Dutch law, for the proposition we contend for. It is also recognized by English law: *Hayes and Jarman, forms of wills, p. 582* [ed. 1863.] In *Dufaur v. Pereira* (1) a mutual will by husband and wife of their joint estate was held by the Court of Chancery here binding on the wife, the survivor, and on her personal estate. Again in *Lord Walpole v. Lord Orford* (2) although the Court refused to enforce an agreement for [247] a mutual will as being uncertain and unfair; it by no means decided that such a will could not be made or enforced: *Dillon v. Parker* (3). Here it was sufficiently established that the widow adopted and acted under the joint will, and she was precluded by acquiescence and adiation from repudiating it, even if she had such power. Like the English law of election, she chose to take under the will and acted under it: *Worthington v. Wigginton* (4).

The consideration of the judgment having been reserved was now delivered by

SIR ROBERT COLLIER:

This was an action of debt on a bond brought by the plaintiff, as acting executor of the late *Cornelis Mostert, sen.*, against the defendant for the recovery of the sum of £3,750. Among other pleas, not now material to notice, the defendant pleaded that he had been released from this obligation by the terms of the mutual will of *Cornelis Mostert* deceased, and his surviving wife. The plaintiffs replied by a general denial, and, further, that the defendant was at all events liable for half the amount of the bond, the share of the surviving spouse, who had repudiated the mutual will. Judgment was given for the defendant by the Chief Justice Sir *Sidney Bell*, and Mr. Justice *Fitzpatrick*, — the majority of the court, — Mr. Justice *Denyssen* dissenting. The appellants now contend that they are entitled to judgment for one-half, but only one-half, of the amount of the bond.

(1) 1 Dick. 419; 2 Harg. Jurid. Ex., 101.

(2) 1 Swan. 359.

(3) 24 L. J. (Ch.) 773.

(4) 3 Ves., 402, 416.

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The facts material for the decision of this case are as follows :

The bond was executed by the defendant on the 11th of November, 1859, in favour of *Cornelis Mostert*, jun., whose nephew he was, and whose daughter he had married, to secure the purchase money of a farm which *Cornelis Mostert*, jun., had sold to him. *Cornelis Mostert* had been married to *Elizabeth Jacoba* his wife, in community of goods. On the 31st of August, 1860, *Cornelis Mostert*, sen., and his wife, made what is commonly called "a mutual will," in the manner customary in the colony.

The provisions of that will, as far as they are material to the present case, were these :

An estate, together with the fixtures, furniture, &c., was left 248] as *a prelegacy to the survivor on condition of the survivor paying £3,000 to the estate of the predecessor.

Certain specific legacies were given to some of the children and grandchildren, to be paid after the death of the survivor of the testators. Certain sole and universal heirs were nominated, being the survivor of the testators, and their children and grandchildren, mentioned by name, in the whole to the number of ten, all of whom were to take equal shares ; and "in case of the predecease of one or more of them their lawful descendants by representation *per stirpes*," subject to the following among other stipulations, namely :

"First, that in computation with the inheritance of each of the instituted heirs being children or grandchildren of the testators, shall have to be brought all that he or she respectively shall be found to be indebted to the estate of the testators.

"Secondly, that when and where such debts should happen to exceed the amount of the inheritance from the estate of the first dying, the heir or heirs whom it may concern shall not need to bring up (pay) the excess directly, but that it shall be sufficient for them to remain indebted to the survivor for such excess above inheritance from the estate of the first dying, to be afterwards at the death of the survivor of the testators brought into computation with his, her, or their inheritance, from the estate of the latter.

"Thirdly, that, in so far as the inheritance from the estate of the first dying falling to the share of one or more of the instituted heirs, might exceed the amount of his, her, or their debts to the estate, the excess of inheritance above debts may and shall be paid out to him, her, or them respectively, free and unburdened.

"Fourthly, that all that shall fall to the share of the aforesaid instituted heirs of the testators, as inheritance from the estate of the survivor of the testators (and in case, and in so far as the said heirs may have remained indebted to the survivor of the

testators for surplus of debts above the inheritance from the first dying, then after deduction of such debts), shall be and remain as the same is hereby, burdened with the entail of *fidei commissum* in such manner that only the interest or usufruct thereof shall be enjoyed by the heirs of the testators and their surviving spouse *the latter so long as they remain unmarried, whilst [249 the capitals themselves shall devolve and go over, after their death, undiminished and unburdened, to their lawful descendants, *per stirpes*. And the testators did further declare that they have made this *fidei commissary* disposition in order to insure to their aforesaid heirs, as also to their children and spouses (the latter so long as they remain unmarried), maintenance and the means of living in case of misfortune, going backwards in pecuniary circumstances or mercantile affairs, insolvency or bankruptcy, or other accidents, and especially in so far as they may at present be insolvent."

And other provisions follow which are not so material to the present case.

"Fifthly, if, however, it should come to pass that one or more of the aforesaid instituted heirs of the testators is or are indebted to the estate of the survivor of the testators more than the amount falling to his, her, or their share as inheritance therefrom, it is in such case the will and desire of the testators that any excess of debts above the inheritance falling to the share of such heir or heirs shall be remitted to him, her, or them, as the same is hereby remitted to him, her, or them, *nunc pro tunc*, and that such excess of debts above inheritance shall not be allowed to be taken in the computation of the inheritance of the respective heirs, as it is not the desire of the testators that the same shall be considered as forming any part of the estate, but that, on the contrary, the inheritances of the respective heirs shall be decreased equally in proportion to the joint amount of the excess of debt above inheritance remitted in manner aforesaid."

Then follows the appointment of executors in these terms.

"And the testators declared to nominate and appoint as executors, testamentary administrators of the estate, and guardians of the union, and *fidei commissary* heirs, to wit: "the testator, his wife, the present testatrix, together with the *South African Association* for the administration and settlement of estates, and the testatrix declares to nominate and appoint her husband the present testator alone."

Cornelis Mostert, sen., died on the 15th of December, 1862.

*On the 23d of December, 1862, a certificate was duly [250 granted by the proper authority to the widow of *Cornelis Mostert*, and to the *South African Association*, appointing them executors testamentary of the will of *Cornelis Mostert*. On the 21st of

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January, 1863, the widow wrote the following letter to the association :

" Gentlemen,—With reference to the will of my late husband, Mr. C. Mostert, senior, I hereby declare that I do not accept the pre legacy made to me of the garden or estate called *Welgedaan*, situated at the upper end of *St. John Street*, with all the moveable property, trinkets, and cattle which are therein, and request you to sell the same publicly, for account of the estate, in the month of March. I shall supply you with a list of some articles which I wish to keep out for myself.

" With respect to the piece of land with the buildings thereon, situated in *Breda Street*, now occupied by Mr. J. J. Meintjes, I desire that the same be without delay transferred to my daughter *Jacoba Anna Mostert*, married without community of property to the said *Meintjes*, to whom the same was sold by my late husband for £1,500, when a mortgage bond must be passed by my said daughter for the full amount of the purchase money, £1,500 bearing interest from —, in favor of the estate of my husband, all the expenses of this transfer and of the mortgage bond to be passed by my daughter, also transfer dues, expenses of diagram, and all other expenses in connection with the said transfer and mortgage bond, must be paid out of the estate of my husband.

" With regard to the different shares in companies which have been found in the estate, and are set forth in the inventory, it is my desire that the same be sold as advantageously as possible for the estate; with the exception, however, of one share in your association, with regard to which my desire is that the same may be taken over by my son, *Jan Fredrik Mostert*, at the value now set upon it in the books, without any premium; and as it will be necessary to take the opinion of the members of the association upon this subject, I request you will employ your influence as much as possible to have this my wish gratified.

" I am your servant,

" Widow, C. Mostert, born *Louw*."

On the 28th of August, 1863, she executed the following 251] document: * " I the undersigned, *Elizabeth Jacoba Louw* widow of the late Mr. *Cornelis Mostert*, senior, in my capacity as co-executrix testamentary with the *South African Association*, &c., of my aforesaid husband, *Cornelis Mostert*, senior, do hereby declare to ratify and approve of everything which has already been done and performed by the said association in the administration of the estate of the said *Cornelis Mostert*, senior, and which shall hereafter be done and performed; and also hereby to grant full power and authority to the said association, in their own name, and also (as acting for me) in my name to

make transfer and conveyance to the respective purchasers of immovable property from said estate, and such transfer shall be considered by me as having been made with my concurrence and knowledge, under obligation of my person and property, according to law. *"E. Mostert."*

"Cape Town, 28th August, 1863."

On the 18th of September, 1863, the widow *Mostert* wrote the following letter :

"To the board of directors of the South African Association for the administration and settlement of estates.

"Cape Town, 18th September, 1863.

"Gentlemen,—I have resolved to claim only the net half of the joint estate of my late husband and myself, and which, by virtue of the community of property which has existed between us, belongs to me by law, and to forego all legacies, and also the child's portion bequeathed to me by my late husband. I now kindly request you, as the administering executors of the said estate, to liquidate the same as speedily as possible, and to pay me the half share due to me, in cash, as I am not inclined to take in payment any bonds due to my children.

"I am, your obedient servant,

"E. Mostert."

The association proceeded to administer the estate, and filed accounts headed as follows :

Liquidation and distribution account of the joint estate of the late *Cornelis Mostert* (sole and surviving spouse *Elizabeth Jacoba Louw*, as relinquished by him), according to mutual will, which *accordingly is framed by the said *Elizabeth Jacoba Louw* [252 and the *South African Association*, in their capacity as executors testamentary, pursuant to letters of administration of the 23d of December, 1862."

And they received the ordinary commission as executors.

Subsequently, the executors relinquished all their interest to the plaintiff, who instituted this suit.

It was contended on behalf of the appellant, that, under these circumstances, the widow had a right to revoke the will as far as it dealt with her own property, and to claim that half of the joint estate of her late husband and herself, to which she would have been entitled if she had made no will; that, consequently, she could sue the defendant for half of the debt owing by him to the joint estate, and transfer the power of suing for it to the plaintiff.

On the part of the respondent it was contended, that she had no power to revoke any part of the will, and that consequently the debt could not be sued for.

The main questions which arise in the case are these:

First, could the widow *Mostert* revoke the will as far as it affected her share of the property, if she took or elected to take the benefit of its provisions in her favor?

Second, could she revoke it if she did not take or elect to take such benefit?

Third, did she or did she not take or elect to take such benefit?

The views of the Judges of the Supreme Court of the colony may be shortly stated thus:

The Chief Justice inclined to the opinion that she had so elected, but held that, even if she had not, she could not revoke the will. Mr. Justice *Fitzpatrick* held the latter proposition.

Mr. Justice *Denyssen* held that she had not so elected, and, that being so, that she had the power of revoking the will.

It is not to be expected that much light will be thrown upon the questions which arise in this case by the very scanty authority to be found on the construction of documents in the nature of mutual wills in this country, where they are of rare occurrence, and where the laws regulating the relations of husband and wife are in many respects different from those of the colony.

253] *It may be enough to observe that, in the case of *Dufaur v. Pereira* (1), Lord *Cumden* held that a husband and wife, having made a mutual will, and that the wife, after her husband's death, having possessed all his personal estate, and enjoyed the interest thereof during his life, by that act bound her assets to make good all her bequests in the mutual will, and that her subsequent will, so far as it broke in upon the mutual will, was void. And that, in the case of *Walpole v. Lord Orford* (2), Lord *Loughborough* refused to confirm the compact of a mutual will, under circumstances which are thus stated in Mr. Justice *Williams'* book on executors, vol. i., p. 122 [6th ed.]:

"The will of *George Earl of Orford*, made in 1756, and *Horace Lord Walpole's* codicil of the same date, made in concert, constituted in effect, a mutual will. *Horace Lord Walpole* died in 1757, without revoking his part of the mutual will, viz., the codicil of 1756. *George Earl of Orford* died in 1791, when it appeared that he had made a codicil in 1776; and, this, by reason of a reference to his last will, bearing date in 1752, was construed as a revocation on his part of the mutual will, viz., the will of 1756. A case was then raised in equity, that the mutual will of 1756 became irrevocable on the death of *Lord Walpole* in 1757, though it was admitted to be revocable by either during the joint lives of *Lord Walpole* and *Lord Orford*, with notice to the other. And the judgment of Lord *Cumden* in *Dufaur v.*

(1) 1 Dick. 219, the judgment is also reported in 2 Harg. For. Arg. 272, and 2 Harg. Jurid. Ex., 101.

(2) 3 Ves., 403.

Pereira was mainly relied upon in defence of that position. Lord *Loughborough*, however, refused to enforce the compact of the mutual will; but this was chiefly, it seems, by reason of the uncertainty, and, in some sense, unfairness, of the compact; so that it leaves the principle of Lord *Cumden's* decision in *Dufaur v. Pereira* wholly unshaken."

The solution of the questions in this appeal must be found in the authorities on the Roman-Dutch law in force in the colony.

By the Roman law the property of husband and wife was separate, and each was entitled to dispose of it at pleasure, either during life or by will.

The customs of the Dutch introduced community of goods *between husband and wife, the husband being the ad- [254 ministrator of the property, and holding the relation of curator or guardian to the wife; and this community of goods was enforced and preserved by a strict prohibition of all contracts relating to property between husband and wife. On the death of either, the survivor took half of the property; the other half in the absence of testamentary disposition, going to the heirs of the deceased.

Both husband and wife retained the power of disposing of their respective shares by will, and any agreement renouncing this power was void. *Voet ad Pandectas, Lib. xxviii. tit. 3, s. 10*: "*Ambulatoria est hominis voluntas ad extremum vitæ halitum . . . ideo revocationem testamenti a jure concessam impedire nequit pactum de non revocandâ vel mutandâ voluntate interpositum.*" By custom the form of mutual wills was introduced, which, sometimes adopted by persons not related to each other, became the common form of testamentary disposition by husband and wife. Much authority (as was to be expected) is to be found bearing upon wills of this description, and the following general rules of law may be treated as clearly established:

First, that such wills, notwithstanding their form, are to be read as separate wills, the dispositions of each spouse being treated as applicable to his or her half of the joint property.

Second, that each is at liberty to revoke his or her part of the will during the co-testator's lifetime, with or without communication with the co-testator, and after the co-testator's death.

In support of these general rules of law may be cited *Grotius*, Introduction to Dutch Jurisprudence, B. I, c. v., s. 25; B. 2, c. 17, s. 24 and notes; *Bynkershoek, Quæsti. Juris Privati, Lib. III., c. vii.*; *Huber's Heden daaghe Reghtsgeleertheit*, B. II., c. 12; *Schorez* notes ad *Grotius*, B. II., c. 15, s. 9; *Van der Keessel, Thes.* 298, B. II., ch. xvii., s. 24; *Van der Linden*, Institutes of the laws of *Holland*, B. I., ch. ix., s. 3, pl. 5, p. 129; and other authorities referred to in the judgment of Mr. Justice *Denyssen*.

The general rule being established, it next becomes necessary to ascertain the exceptions to it. They are thus stated by *Grotius*, B. II., c. 15, s. 9 (translated by *Herbert*):

“When the spouse who dies first has bequeathed any benefit in 255] *favour of the survivor, and has afterwards limited the disposal of the property in general after the death of such survivor, then such survivor, if he accepts such benefits, may not afterwards dispose of his or her share by last will in any manner at variance with the will of the deceased.”

The substance of this doctrine, though expressed in varying terms, is to be found in the leading authorities from the time of *Grotius* to the present day.

Van Leeuwen, in his *Censura Forensis*, a book of high authority, after stating the general rule, thus describes the exception, B. III., c. 11, s. 7:

“*Quæ tamen regula limitatur (præsertim inter conjuges) casu quo duo simul testantes, alter alterum heredem instituit, sub eâ conditione atque onere; ut omnia ea bona quæ post mortem ultimo morientis, ex mutua hereditate supererunt, relinquantur huic aut illi. Quo facto supervivens, postquam hereditatem primo morientis adierit, pro sua etiam parte aliter, aut contra eandem voluntatem mutuam de novo disponere haud potest, mutuo quasi consensu, eorundem patrimonio consolidato, et ad unicum patrimonium redacto.*”

A passage to the same effect is to be found in *Van Leeuwen's* Commentaries on the Roman-Dutch Law, B. II., c. 3, s. 8.

Their lordships understand the expression, “*postquam hereditatem primo morientis adierit*”—“after he has adiated the inheritance of the predeceaser,” as equivalent to the “acceptance of benefits” spoken of by *Grotius*. “Adiation is a term well known to the Roman-Dutch law, and although Mr. Justice Connor in the case of *Oosthuysen v. Oosthuysen* (1), may be correct in saying that its technical sense, as applicable to the institution of an heir, may have become obsolete, it appears to be used by *Van Leeuwen* and other writers, when applied to the survivor of two co-testators under a mutual will, in a sense equivalent to the adoption and confirmation of the will by the acceptance of benefits under it.

Many extracts from the *Hollandsche Consultation*, translations of which certified by the registrar of the Supreme Court of the colony, have been sent to their lordships, are in accordance with these doctrines; (among them may be cited vol. i., Consultation 50; vol. ii., Consultation 53; vol. iii., Consultation 3; vol. 256] iv., *Consultation 43). To the same effect are extracts translated and certified in the like manner from *Van der Berg's* *Nederlandsch Advys Boek*.

(1) 1 Buchanan's Cape of Good Hope Cases, p. 51.

The circumstances of the case referred to in Consultation 210 of the second book of this work very much resemble those of the present.

There the husband made a will to which the wife gave her written assent (the effect of which is stated to be equivalent to her having been a party to a mutual will), whereby the property of both was given to the wife for life, with remainder on her death if she should survive and die unmarried, to the blood relations of both in the proportion of two-thirds to those on the side of the testator, one-third to those on the side of the testatrix. There was also a provision "that the testing parties concurred in giving to the testator's brother all that he was in any way indebted to the estate, not wishing that he should be called upon to pay it."

The widow, for four years after the death of her husband, remained in possession of the common estate; nevertheless, it was held that she could revoke the will as far as it related to her half of the joint property, and that she could sue the testator's brother for her half of the debt due by him to the estate. It was said, "there is no difficulty in the way of the widow now repudiating the testament and retaining the half of the common estate by virtue of the community that she has for four years remained in possession of the common estate, for such continuance in possession is not an act from which it can be understood that she wishes to renounce her right of community and take under the will, for, as survivor, she was entitled to remain in possession until such time as she was called upon to make partition."

Other extracts from *Van der Berg's Nederlandsh Advys Boek*, from the some *Consultations of Utrecht*, and others from *Corens' "decisiones et concilia"* support the doctrine laid down by *Grotius*.

These authorities have been recognised and confirmed by three cases decided in the Supreme Court of the colony: viz., *Brits v. Brits' Executors* ⁽¹⁾; *Hofmeyr v. De Wet* ⁽²⁾; and *Oosthuysen v. Oosthuysen* ⁽³⁾.

*In *Hofmeyr v. De Wet*, Sir John Wilde, then the Chief [257 Justice thus lays down the law: "A husband and wife may both make their testament in one and the same paper writing, but the paper is considered to contain two separate testaments, which each of them may always alter separately, and without the knowledge of the other, before as well as after the death of either of them; but if they had benefited each other reciprocally, and directed how the common estate is to go after the death of the survivor, if the latter had enjoyed or wishes to enjoy the

(1) 1 Buchanan's Cape of Good Hope Cases, p. 312.

(2) Ibid. p. 317.

(3) 1 Buchanan's Cape of Good Hope Cases, p. 51.

benefit of it, such survivor can make no other last will or testamentary disposition of his or her share, unless he or she had rejected the benefit made and ceded the same." In *Oosthuysen v. Oosthuysen*, Sir William Hodges, then Chief Justice says: "If the joint spouses have benefited each other, and have jointly and by common consent directed how the estate shall go after the death of the survivor, such survivor cannot, after the adiation of the estate and the enjoyment of the benefit, make another testament of his or her share of the joint estate ⁽¹⁾."

Much on the same principle it was decided by the Supreme Court of the colony that an express renunciation by the wife during her husband's life of her right to a half of the joint property, and an agreement to accept in lieu thereof the provisions of his will, were not binding upon her after his death, but that the right of election remained: *Scorey v. Scorey's Executors* ⁽²⁾.

It may be added that Mr. Burge, in his Commentaries on Colonial Law, vol. iv., p. 405, lays down the same doctrine.

These authorities (to which more might be added) establish that the power which a surviving spouse generally has to revoke a mutual will as far as it affects half of the property, is taken away on the concurrence of two conditions.

First, that the will disposes of the joint property on the death of the survivor, or, as it is sometimes expressed, where the property is consolidated into one mass for the purpose of a joint disposition of it.

Second, that the survivor has accepted some benefit under the will.

It may be observed that these conditions appear to apply as 258] *much to a will made by one spouse with the authority of the other as to a mutual will in the strict sense of the word, i.e., a will executed by both.

It next becomes necessary to inquire what authority there is for rejecting the second condition? and holding that a mutual will "consolidating into a mass" the joint property, is absolutely irrevocable and unalterable by the survivor?

The main authority cited in support of this proposition appears to be a passage in *Peckius, de Testam. Conjug. Lib. 1, c. 43*, which is as follows:

"*Quoniam verò est alterius loci inquirere, quomodo in unicroum testamenta sunt revocabilia, quibusque in hoc cautionibus utendum sit: supersedebò illis omnibus huc extra ordinem congerendis, si illud unum avellidero consultum quoque esse ad impediendam revocationem, ut alter conjugum cum consensu alterius, de utriusque bonis et eorum parte ad communium utilitatem liberorum solus testetur. Tunc enim dispositio,*

⁽¹⁾ Buchanan's Cape of Good Hope Cases, p. 312.

⁽²⁾ Menzies' Cape of Good Hope Reps., Book 2, p. 231.

licet sit revocabilis ex parte testantis, tamen ex parte consentientis transit in contractum et sit irrevocabilis."

It is to be observed that the authorities which *Peckius* cites in support of this proposition are not by his own statement of them directly in point, inasmuch as they do not refer to wills of husband and wife, and further that it is not easy to conceive a testamentary contract by which one party is bound while the other is left free.

This doctrine, however, of *Peckius* is controverted by *Huber* in his "*Prælectiones*," lib. xxviii., tit. 3, s. 4, who contends with much force, that it is opposed to the law which prohibits contracts between husband and wife for prescribing the manner and extent to which the common property shall be enjoyed by the survivor, and observes: "*Verius tamen videtur, non obstante tali pacto, testamentum posterius factum valere; quid contractus et ultimæ voluntates sunt res ita separatæ, ut hæc per illos impediri non debeant, neque possint, adeo ut ne quidem pactis dotalibus de futurâ successione, testamenti factio cuiquam adimatur.*"

A passage from *Coren's* obs.: 12, p. 54, cited by the Chief Justice in his judgment, confirms the view of *Huber*. After stating a case of a mutual will and adiation by the surviving wife, *Coren* *proceeds: "She had given her consent to the hus- [259] band's disposing as he did, and then by adiating her husband's inheritance, she bound herself by a *quasi* contract to the observance of his will." The *quasi* contract arose not upon her consent being given to the making of the will (as the Chief Justice appears to read the passage), but on her election to accept the benefit of it after her husband's death.

It is to be observed, however, that *Van Leeuwen* in the extract before quoted from his *Censura Forensis*, in which he lays down "adiation" as one of the conditions necessary to deprive a surviving spouse of the power of revocation, refers to the above cited passage in *Peckius* as an authority for his position, from which it would seem probable that reading the passage in connection with the context, he understood this condition to be implied. It is further to be observed that *Groenewegen* would appear to take this view, for in his note to the passage of *Grotius* above quoted, he also cites the same passage in *Peckius* as supporting the doctrine laid down in the text. If the passage is to be read with this qualification, it is consistent with all the authorities. Their Lordships have not found any other passage than the above in *Peckius*, in which a gift over of the joint property to children is suggested to be less revocable than such a gift to other relations, or indeed to strangers.

A passage from *Voet, de pactis dotalibus* (lib. 28, tit. 4, s. 63) has been read, in which he does not mention "adiation" as necessary

to deprive a surviving spouse of the power of revocation ; but inasmuch as he cites the extract above given from the *Censura Forensis*, it cannot be assumed that he intends to controvert its authority.

A celebrated cause to which the will of *Philip*, Duke of *Arshot*, and *Johanna Van Halewyn* his consort gave rise, wherein it was decided that the mutual will was irrevocable by the survivor, was cited on behalf of the respondent from *Decker (Dissert. Jur., lib. I., c. 1)*, who reports his own argument at great length, but the decision somewhat shortly. Whether or not the survivor in that case had adiated does not appear very clearly from *Decker's* report, but adiation may be inferred from the reference to the case in *Van Leeuwen's Roman-Dutch law (B. 3, c. 3, s. 8), 260]* which is as *follows : " When two married persons have reciprocally benefitted each other, and directed how the goods of the common estate should devolve after the death of the survivor of them, such survivor, having enjoyed the benefit, cannot dispose of his or her share by such rule ; and so it was adjudged in the causes upon a will between *Philip*, Duke of *Arshot*, and *Mrs. Johanna Van Halewyn*, his consort, by the high court of *Mechlin*."

On the whole, their Lordships are of opinion, that the great preponderance of authority (to say the least of it) supports the doctrine laid down by *Grotius*, and reaffirmed but a few years since by two successive Chief Justices of the colony, whereby adiation or reception of benefits is treated as one of the conditions without which a surviving spouse is not deprived of the power of revocation.

It remains to apply the law to the facts of the present case.

It has been argued that the joint disposition of the property after the death of the survivor in the present case applies only to part of it, that some provisions of the will indicate an intention that the dispositions of the respective testators should apply only to their own shares, and that in this case even adiation would not deprive the widow of the power of revoking the instrument so far as it applies to her share of the property.

Their Lordships, however, are of opinion, that the will so deals with the joint estate, that the widow would not have had the power to revoke any part of it, if she had adiated in the sense before explained.

On the 18th of September, 1863, she wrote a letter expressly repudiating any benefit under the will, and declaring her election to take her share of the inheritance to which she would have been entitled if no will had been made. Their Lordships are unable to concur with the Chief Justice, that before this she had declared her election to adopt the will. They do not infer

this election from her letter of the 21st of January, 1863, in which she renounces the pro legacy of the farm, at the same time expressing to her co-executors her desire with respect to the administration of portions of the property; nor from her acceptance of commission, even if that commission were more than she might be strictly entitled to as executrix of her husband's will; nor from the form of the accounts made out by the association which were *certainly intended to be prepared [261 on the footing of the letter of the 18th of September, whereby she renounced the will. Their Lordships, therefore, find upon the evidence, concurring herein with Mr. Justice *Denyssen*, that the widow *Mostert* did not adiate or adopt the will in the sense of electing to receive the benefits to which she would have been entitled under it; and that being so, they are of opinion, that she had by law the right to revoke it as far as it affected her property, and to claim her half of the inheritance.

The Chief Justice expresses his opinion that "it is much more consistent with justice and fair dealing, and much more conducive to confidence and good feeling between spouses to hold that the survivor has made his or her election in the lifetime of the predeceaser, than that the survivor, having given the predeceaser every reason to believe that the arrangement between them would be operative after his or her death, may after the death of the predeceaser altogether upset it by resorting to his or her rights.

This reasoning applies with equal force to the power of revocation during the life of a co-testator without communication with him, a power which appears to be placed beyond doubt by the authorities. If the question were to be discussed upon principle independently of authority, it should be borne in mind that, while the power of revocation may be in some cases open to the objections urged by the Chief Justice, yet that to limit it as his judgment would do, might enable husbands disposed unduly to exercise their marital authority and influence, to coerce their wives into renouncing irrevocably those rights of inheritance, which it appears the especial policy of the law of the colony to protect. But these considerations are for the Legislature. *Bynkershoek*, indeed, speaks with strong disapprobation of abuses of the law, not infrequent in his time, whereby one cotestator, whose testamentary dispositions had been the consideration of those of the other, revoked his part of the will without communicating with the cotestator; but *Bynkershoek* treats the right to do this by law as clear, nor can it be doubted that that great judge and jurist would have deemed himself bound to give effect to the law as he had laid it down, whatever may have been his opinion of its policy. Their Lordships have but one

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262] duty — to declare what they deem to *be the law ; and for the reasons they have given will humbly advise Her Majesty to reverse the judgment of the Supreme Court of the colony, and to order that judgment be entered for the plaintiff for one moiety of the bond with interest, credit being given for any payments in account which have been made. The appellant will have the costs of this appeal.

Solicitors for the Appellant : Messrs. *Cole, Cole, & Jackson*.

Solicitors for the Respondent : Messrs. *Venning, Robin, & Venning*.

Mutual wills if not revoked are valid. 1 Redf. on Wills, 182-3; Matter of Day, 1 Bradf. Surr. Rep., 476.

Where two persons executed a paper purporting to be a will whereby, in consideration of mutual friendship, they agree that in case of the death of either the survivor shall pay the expense of sickness and burial of the other and have his estate it is not an agreement but a will and revocable by either and is revoked by a separate will of either. *Schumaker v. Schmidt*, 4 Am. Rep., 135, 44 Ala., 454.

An oral agreement by two persons to make mutual wills in favor of each other is void under the statute of frauds. *Gould v. Mansfield*, 103 Mass., 408.

Where husband and wife each had a will drawn in favor of the other but each, by mistake, signed the will intended for the other it was held that they were ineffectual for any purpose. *Alter's Appeal*, 5 Am. Rep., 433, 67 Penn. St. R., 341; 10 Am. Law Reg. N.S., 242; see also *Calkins v. Falk*, 39 Barb., 620 affirmed, 38 How., 62, 41 N. Y., 619; *Gove v. Worster*, Lalor's Sup., 30; 1 Sto. Eq. Jur. § 736a. And that an act of the legislature authorizing the Courts to reform the will was unconstitutional and void, as illegally divesting the estate of the heirs. *Alter's Appeal* 5 Am. Rep., 433, 67 Penn. St., R., 341, 10 Am. Law Reg. N.S., 242.

J.C.* June 4, 5, 1872.

JAMES MACCLAREN and JOHN MACCLAREN, Appellants;

AND

ARTHUR H. MURPHY and JEREMIAH C. MURPHY, Respondents.

JAMES CONNOLLY, Appellant;

AND

JAMES MACCLAREN and JOHN MACCLAREN, Respondents.

[Law Reports, 4 Privy Council Cases, 202.]

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR THE PROVINCE OF QUEBEC, CANADA (APPEAL SIDE).

Contract for sale of timber in possession of guardian or garnishee — Construction and effect of.

Action for damages for non-performance of a contract for the sale of certain spars and timber, "to be delivered free of charge to-morrow, or as soon as they can be got out of the hands of the guardian; but the purchasers not bound to take them if not delivered in one week unless they like." No delivery having been made within the time specified, by reason of the guardian in possession of the spars insisting on retaining them in consequence of a writ of *saïs-arrest* issued in an action instituted against the ostensible owner of the spars and tim-

**Present* :—SIR JAMES WILLIAM COLVILLE, SIR MONTAGUE EDWARD SMITH and SIR ROBERT PORRETT COLLIER.

ber, whose mark they bore, having been served on him, notwithstanding that he was released by subsequent proceedings, and might have legally given them up:

Held, that not having done so, the parties contracting for the sale of the spars and timber were relieved from the damages awarded by the Court below for the non delivery thereof, on the ground that the reasonable construction of the words getting "out of the hands of *the guardian," was the actual, and [263 not constructive or legal title to the possession' which could alone insure the delivery :

Held, also, that an action *en garrantie*, founded on the former right of action, against the guardian as *garant*, by the original contractors for damages for wrongful detention of the spars and timber, could not, under the circumstances, be sustained; and the judgment made in such an action, awarding damages, reversed.

These appeals were brought from judgments of the court of Queen's Bench in *Lower Canada*, reversing the judgments of the Superior Court in favor of the appellants, and condemning the appellants in the sum of 4,210 piastres, with interest and costs.

In the first appeal the action was brought by the respondents, the *Murphys*, against the appellants, the *Maclarens*, to recover damages from them for breach of a contract to deliver certain spars and timber.

The declaration stated, in effect, that the plaintiffs and the defendants, on the 1st of July, 1864, entered into an agreement in writing for the sale by the defendants to the plaintiffs of certain spars and timber, to be delivered the following day, or as soon as they could be relieved from a seizure under mesne process, in virtue of which they had been attached, and were in the hands of a guardian. That the defendants subsequently informed the plaintiffs that the spars and timber were released from the seizure. That the plaintiffs, relying on the defendants' statement, went to large expense in preparing to remove the spars and timber, and made contracts for their resale, from which the plaintiffs would have derived large profits, but that the defendants had not delivered to the plaintiffs the spars or timber.

The defendants pleaded the general issue, and an *exception péremptoire en droit*, alleging that they made every effort to deliver the spars and timber, but that the appellant, *Connolly*, claimed them as garnishee, and the defendants were unable to obtain *main levée*, and that this amounted to a *force majeure*, for which the defendants were not responsible.

The plaintiffs joined issue on the defendants' plea.

In the meantime the defendants brought an action *en garrantie* against *Connolly*, which was the subject of the second appeal. Evidence was taken in both actions at *enquête*, and the whole was included in the same record, and the appeals were heard together.

*The facts, of which there was no dispute, were as follows: [264

In June, 1864, a quantity of spars and timber arrived at *Quebec* which were supposed to belong to one *Meech*, the spars being

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marked with his initials. *Meech* was in difficulties, and Messrs. *Roche & Co.*, who were creditors, on the 21st of June issued a writ of *arrêt simple* on mesne process, and seized the spars and timber, of which *John Rafferty* was appointed guardian in accordance with the Canadian law. *Rafferty*, on June the 23d, placed the spars in the boom of *James Connolly*, who gave him a written acknowledgment that he held it to his order as guardian. The *Maclarens*, however, intervened in the action against *Meech*, claiming the spars as being really theirs, and on the 27th of June, having given security for them, obtained an order from Mr. Justice *Taschereau* that they should be delivered to them upon their paying the costs that had been incurred. Some delay took place in the taxation of these costs, and the spars meanwhile remained in *Connolly's* boom, and on the 1st of July a second writ of *saisie-arrêt simple* was issued at the suit of Messrs. *Burstall & Co.*, who were also creditors of *Meech*; and Messrs. *Burstall & Co.*, also, at the same time, issued a writ of *saisie-arrêt en main tierce* against *Connolly*. In execution of the writ of *arrêt simple*, the bailiff seized the same spars, and he appointed *Connolly* guardian under this seizure, who accepted the appointment, as appeared by his signature to the inventory made by the bailiff. At the same time the bailiff served upon *Connolly* the writ of *saisie-arrêt en main tierce*.

On the same day, the 1st of July, 1864, the *Maclarens* entered into a written contract for the sale of the spars to Messrs. *Murphy* in the following terms:

“ Quebec 1st July, 1864.

“ *J. Maclaren & Co.* sells and *Arthur Murphy & Co.* buys—

“ 478 Red pine spars, at \$35.

“ 11 White pine masts, \$520.

“ And 1 Crib white pine, &c., at 15 cents per foot.

“ Terms— $\frac{1}{3}$ cash.

“ $\frac{1}{3}$ 60 days.

“ $\frac{1}{3}$ 90 days.

“ *M. J. Wilson*, Esquire.

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*“ Paper indorsed by *A. H. M. & Co.*

“ Spars, &c., to be delivered outside of Mr. *Connolly's* booms, free of charges, to-morrow, or as soon as they can be got out of the hands of the guardian, but purchasers not bound to take them if not delivered in one week unless they like.”

“ (Signed) *J. Maclaren & Co.*

“ (“) *Arthur H. Murphy & Co.*”

It was for breach of this contract that the first action was brought.

It did not appear from the evidence whether the contract was made before or after the second seizure, or, if the latter, to which of the two guardians the contract referred.

On the 2d day of July, the taxation of the costs under the first seizure was completed, and the spars became deliverable to the *Maclarens* under the order of Mr. Justice *Tuschereau*. The *Maclarens* also, on the same day, procured that one *Forsyth* should be substituted for *Connolly* as guardian under the second seizure, and *Forsyth* being willing that the spars should be delivered to the *Maclarens* first, *Connolly* gave to them, on the 4th of July, the following acknowledgment :

“ *Woodfield Harbor, 4th July, 1864.*

“ I hold, subject to the order of Messrs. *J. Maclaren & Co.*, *Meech's* lot of red pine spars placed in my hands by the sheriff, viz., 478 red pine spars, 11 white pine masts, 16 pieces square white pine, 2 pieces square red pine — 507 pieces.

“ (Signed) *James Connolly.*”

On the same day, July 5th, the *Maclarens* took this paper to the *Murphys*, and told them that the spars were ready for delivery, and at their request in lored upon the paper the following delivery order :

“ *James Connolly, Esquire.*

“ *Quebec, 4th July, 1864.*

“ Please deliver the within mentioned spars, masts, &c., to the order of Messrs. *Arthur. H. Murphy & Co.*, free of charges.

“ (Signed) *J. Maclaren & Co.*”

The *Murphys* sent a steamer to take delivery of the spars, but *Connolly* declined to deliver them, alleging that he was bound to retain under the writ of *saisie arrêt en main tierce*. *Connolly* afterwards stated in his evidence, that his only motive [266 in refusing was to protect himself from any liability that he might incur as *tiers saisi* if he delivered. Immediately on *Connolly's* refusal the *Murphys* caused a formal protest to be made to the *Maclarens* for non-delivery of the spars, when the latter said that the cause of the non-delivery was the irregular obstruction put in their way by *Connolly*.

The *Maclarens* then applied to the Court, and on the 7th of July obtained a rule *nisi*, which was made absolute on the 8th of July, against *Connolly*, for the delivery up to them of the spars and timber. From this order *Connolly* appealed, and on the 12th of July Mr. Justice *Tuschereau* decided that in consequence of the appeal he could not further interfere, and the spars and timber remained in *Connolly's* boom till the next sitting of the Court in term, which was not till September, when the appeal from Mr. Justice *Tuschereau's* order was dismissed with costs, and *Connolly* delivered up the spars, which the *Murphys* then declined to take, alleging that they had lost large profits through the appellants not fulfilling their contract, the price of spars in July, 1864, being very high, and the contract a favorable one

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On the 30th of December, 1865, the case in the first and principal action came on for hearing in the Superior Court, when Mr. Justice *Stuart* gave judgment in favor of the defendants, the *Maclarens*.

The plaintiffs having inscribed the action for review before three Judges, it was re heard on the 5th of March, 1865, before the Justices *Badgley*, *Stuart*, and *Taschereau*, who confirmed the judgment, Mr. Justice *Taschereau* dissenting.

From this judgment the plaintiffs appealed to the Court of Queen's Bench for *Lower Canada*, and the appeal was twice argued, first before the Chief Justice *Duval*, and the Justices *Aylwin*, *Drummond*, and *Mondelet*, and subsequently before the Chief Justice *Duval*, and the Justices *Ciron*, *Drummond*, and *Loranger*, and on the 18th of June, 1869, that Court gave judgment, unanimously reversing the judgment of the Court below, and condemning the defendants to pay 4,210 piastres damages, and the costs of the Court of first instance, of the Court of revision, and of the appeal.

267] * The second action was inscribed for *enquête* and hearing on the demand *en garantie*, and on the 6th of February, 1866, was heard on the merits by the Superior Court, Mr. Justice *Stuart* presiding, and the action dismissed with costs, on the ground that the *Maclarens*, the plaintiffs *en garantie*, had failed to establish any legal cause of action against *Connelly*, the defendant *en garantie*. An appeal was brought in this suit before the appeal in "*Murphy v. Maclarens*" was disposed of, and was heard by the Court of Queen's Bench, consisting of the Chief Justice *Duval*, and the Justices *Ciron*, *Drummond*, and *Loranger*, who, the Chief Justice dissenting, on the 18th of June, 1869, reversed the decision of the Superior Court of the 6th of February, 1866, and condemned the appellant, *Connelly*, to pay the *Maclarens*, the respondents in that appeal, the sum of 4,110 piastres. This was the same sum as the Court of Queen's Bench had by their judgment in the first appeal ordered to be paid to *Murphy & Co.*

From the judgments so given the present appeals were brought.

Sir *R. Palmer*, Q.C., and Mr. *A. Cohen*, for the *Maclarens*, appellants in the first, and respondents in the second appeal :

The first and principal action in these cases is one of contract, and involves the right construction of the agreement of the 1st of July, 1864, between the appellants, the *Maclarens*, and the respondents, the *Murphys*, whereby the *Maclarens* agreed to sell and to deliver to the *Murphys* certain spars of timber therein specified on the following day, or as soon as they could be got

out of the hands of the guardian, the purchasers not being bound to take them if not delivered within one week unless they liked. At the time this contract was executed *Connelly*, against whom an action *en garantie* was afterwards commenced, was in possession of the spars, claiming to hold them as guardian *forcé* by virtue of a writ of *saisie-arrêt simple* issued against the effects of *Meech*, the assumed owner of the spars, whose name they bore, in a suit of *Roche and another v. Meech*. In the action against *Connelly*, the appellants, the *Maclarens* obtained judgment, and the appeal of *Connelly*, now before this tribunal, is from the judgment so obtained by them. The suit against *Connelly* was the necessary consequence of the proceedings taken by the *Murphys* against us for breach of contract, *as it was in [268 consequence of *Connelly's* claim to retain the spars that we were unable to deliver them over to Messrs. *Murphy*, and our contract was simply to deliver the spars as soon as they could be got out of the hands of the guardian. We maintain here, as we contended below, that that was the true construction of the contract; and it was abundantly proved that we used every exertion to get the spars out of *Connelly's* hands, but that he refused to deliver them, and retained them in his custody. There was, therefore no breach of contract on our part, and no action for damages for such ought to have been maintained. The law is clear upon that point, and is fully stated in *Addison on Contracts*, p. 1058, where all the authorities are collected. The appellants did all in their power to procure from *Connelly* the delivery of the timber, by intervening in the suit of "*Roche and another v. Meech*," and obtaining the substitution of *Forsyth* for *Connelly* as guardian, who was willing to deliver the spars over to the respondent, but *Connelly* still persisted in retaining them. *Connelly* was not an agent for us, and his acts could not make us liable for the breach, though in the event of our being so *Connelly* was clearly liable in damages to us, and the judgment of the Court of Queen's Bench against him in that respect in the action *en garantie* for damages with costs ought to be sustained. In the principal action, against which we now appeal, we insist, as already urged, that the non-delivery of the spars complained of was not occasioned by any negligence or default on our part, but by *force majeure*, by acts over which we had no control, and for which we are not responsible.

Mr. *Bompas*, for the Respondents, the *Murphys*, in the first appeal:

Mr. *Everett*, and Mr. *Benjamin*, for *Connelly*, the Appellant in the second appeal:

These are two distinct actions, and two separate appeals. The

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first and principal one, is that in which the respondents, the *Murphys*, were plaintiffs, and the appellants, the *Maclarens*, defendants; in the second the *Maclarens* were the plaintiffs, and the appellant *Connolly* the defendant. The action in the first case was a breach of contract, that in the second against *Connolly* 269] was **en garantie*. In both cases damages were sought, and in both cases awarded. The main case, however, is that which constitutes the first appeal, and arises out of the 1st of July, 1864. We maintain that we were proved to have sustained the damages awarded to us through the non-fulfilment by the appellants of their contract. They were justly held by the Court of Queen's Bench to be bound to repay to us the expenses incurred by us in consequence of the representations made to us that the wood, the subject of the contract, was ready to be delivered. The conduct of *Connolly* in no way affected the liability of the appellants to us for breach of their agreement. He was a garnishee of the spars placed under his care by *Rafferty*, who was appointed guardian when the seizure by *saisie-arrêt simple* was made by the sheriff in the action of *Roche & Co.* against *Meech*. The exigency of the writ of *saisie-arrêt simple*, by the law of *Lower Canada*, is to dispossess the defendant of his property seized, until he can obtain a legal guardian to produce it to answer the plaintiffs' demand. Guardians in such cases are of two classes; the voluntary guardian produced by the defendant himself, and who, as a general rule, performs the office of a friend, surrenders the property to the defendant, and substitutes his own personal responsibility to the Court. The other description of guardian is the guardian *forcé*, whose duty it is to keep the actual possession and custody of the property seized. The defendant *Meech* did not appear, and *Rafferty* was accordingly appointed guardian *forcé*. As such guardian, in the interest of all concerned, he applied to a Judge of the Superior Court for leave to put the raft in a place of safety, and an order to that effect was made, whereupon *Rafferty* brought the raft to *Connolly's* cove, and placed it in his custody to hold subject to his, *Rafferty's*, order. That was the state of things and the position of *Connolly* when the appellants intervened in the suit of *Roche & Co. v. Meech* and obtained an order upon terms for delivery over of the timber, which was then in *Connolly's* keeping. to the respondents, the *Murphys*. The terms imposed, so far as the payment of the costs, were not complied with, and no delivery took place. In the meantime the firm of *Bursall & Co.* having instituted a suit against *Meech*, they procured two writs of *saisie-arrêt*, both dated the 1st of July, 1864, against the effects 270] of *Meech*. The first of *these writs was a *saisie-arrêt simple*, like that already issued on behalf of the appellants, the

Maclarens, but the second was of a different nature, being a writ *saisie-arrêt en main tierce*, addressed to the sheriff, and by virtue of which he seized the spars then in the custody of *Connolly*. It was on the same day that the contract for the timber between the appellants, the *Maclarens*, and the *Murphys* was entered into, which is the subject of the principal appeal.

Their Lordships' judgment having been reserved, was now delivered in both appeals by.

SIR ROBERT COLLIER :

The first of these cases was an appeal from the Court of Queen's Bench in *Canada*, reversing the decision of the Superior Court in favour of the plaintiffs (the respondents).

The action was brought by the respondents, who are merchants in *Quebec*, against the defendants (the appellants) also merchants in *Quebec*, to recover damages for the non-delivery of timber under a contract, which was in these terms :—[His Lordship read the contracts *ante*, p. 264, and proceeded.]

The circumstances under which the contract was made, which are necessary to explain its meaning, are as follows :

In June, 1864, a quantity of timber arrived at *Cape Rouge, Quebec*, marked with the initials of one *Meech*, and which are stated to have been known as "*Meech's lot*." Messrs. *Roche & Co.*, who were creditors of *Meech*, on the 21st of June commenced an action against him and issued a writ of *arrêt simple* (on mesne process), in pursuance of which the timber was seized, and one *Rafferty* was appointed guardian of it, in accordance with the Canadian law.

Rafferty took the timber from *Cape Rouge*, to a cove in *Woodfield Harbor*, in the possession of a Mr. *Connolly*, a timber merchant, and delivered it to *Connolly* for safe custody. Whereupon the following documents were signed respectively by *Rafferty* and *Connolly* :

" *Woodfield Harbor*,

" *James Connolly, Esq.* :

" 23rd June, 1864.

" Sir,—Hold raft of red pine spars, marked *C. G. C.*, of which I am guardian, appointed by the sheriff, in a cause of *Rorhe and *Others* against *Meech*, subject to my order. Raft sup- [271 posed to contain between four and five hundred pieces.

" *Jno. Rafferty, Guardian.*"

" Received the above-mentioned raft, which I will hold subject to Mr. *John Rafferty's* order, upon the usual terms and conditions, and without guarantee of the precise number of pieces.

" *Woodfield Harbor*,

" 23d June, 1864.

Jas. Connolly."

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On the 27th of June the defendants, who claimed to be the true owners of the timber, intervened in the action of *Roche and Others v. Meech*, and obtained a Judge's order for the delivery of it to them, that on good and sufficient security being given and upon payment by them, as a condition precedent of *frais de garde*, and cove charges, *sauf répétition*, to be duly taken and allowed, the said raft and spars were to be delivered over to *James Maclaren* and *John Maclaren*, the intervenants in the present cause.

The costs under this order were not taxed, and consequently the timber did not become deliverable under it until the 2d of July.

On the 1st of July, Messrs. *Burstall & Co.*, also creditors of *Meech*, issued a writ of *saisie-arrêt simple*, in execution of which the bailiff seized the said timber, and appointed *Connolly* "voluntary" guardian of it — i.e., guardian without payment, which appointment was accepted by *Connolly*, who signed the inventory made by the bailiff. At the same time Messrs. *Burstall* issued another writ termed *saisie-arrêt en main tierce*, directed to the sheriff of *Quebec*, requiring him "to attach by seizure and arrest in the hands of *James Connolly* . . . and *James Maclaren* . . . garnishees, all sums of money, &c., which they may owe to *Meech*, and all the moveable effects and estate belonging to him, to the value of 2,400 dols. . . . *Meech* is summoned to appear on the 1st of September, the return day of the writ, and the garnishees are then required to attend to declare upon oath what effects of *Meech* they now have, or shall or will have in their hands."

It was on this day, "the 1st of July," that the contract sued upon was executed.

272] *It does not distinctly appear whether it was executed earlier or later in the day than the issuing the writs in the second suit against *Meech*. The Court of Queen's Bench, however, assume that it was made with knowledge of the second as well as of the first seizure, and of the appointment of *Connolly* as guardian under that second seizure. Their Lordships do not doubt that assumption, which does not appear to have been disputed on either side, to be correct.

Before stating the construction which their Lordships put upon the contract, it is convenient to narrate the circumstances subsequent to it as well as precedent, which bear upon the case. On the 2d of July the taxation of costs under the first order (in the suit of *Roche & Co. v. Meech*) was completed, but they do not appear to have been immediately paid.

On the same day a Mr. *Forsyth* was substituted for *Connolly*, as guardian by a Judge's order in the second suit. It is stated

that *Forsyth*, who was a friend of the *Maclarens*, was substituted at their instance with a view to facilitate the delivery of the timber to them.

It does not appear that *Forsyth* made any demand or application to *Connolly* for the delivery of the timber to him, or that he actually obtained possession of it, or made any attempt to do so.

On the 4th of July, the following document was signed by *Connolly* :

“ *Woodfield Harbor, July 4, 1864.*

“ I hold, subject to the order of Messrs. *Maclaren & Co.*, *Meech's* lot of red pine spars placed in my hands by the sheriff, viz., 478 red pine spars, 11 white pine masts, 16 pieces square white pine, 2 pieces square red pine ; 507 pieces.

“ *James Connolly.*”

On the same day the defendants took this paper to the plaintiffs, and at their request indorsed upon it the following delivery order :

“ *Quebec, July 4, 1864.*

“ Please deliver the within-mentioned spars, masts, &c., to the order of Messrs. *Arthur H. Murphy & Co.*, free of charges.

“ *T. Maclaren & Co.*”

Connolly, however, refused to deliver the timber. His reasons for this refusal are thus stated by him in his evidence.

*He says that he was induced to sign the document [273 above mentioned by this representation made to him by the bailiff, accompanied by Mr. *Maclaren*, one of the defendants. “ I was to give up the spars the seizures having been removed.”

This statement must be taken to have been made, for neither the plaintiff nor *Maclaren* was called to contradict *Connolly*, but it was incorrect, because the seizure of Messrs. *Burtsall* was certainly still in force. He further says that Mr. *Hearn*, who was his attorney, and also the attorney for Messrs. *Roche & Co.*, told him that he would not be safe in delivering the spars, that upon Mr. *Hearn's* suggestion he instructed him to get a guarantee from Messrs. *Roche*, which was subsequently given. He adds, “ If I had not got the guarantee or promise that I should have it, I cannot say whether I would have held the spars or not. It was in consequence of the *saisie-arrêt* in my hands under which I was garnishee that I held them.”

In consequence of the refusal of *Connolly* to deliver the timber, Messrs. *Murphy*, on the 5th of July, signed a protest requiring Messrs. *Maclaren* to deliver it, and declaring that they would hold them responsible for all damages, &c., consequent on the non-delivery.

On the 7th of July, Messrs. *Maclaren*, intervening in the suit

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of *Burstall v. Meech*, obtained from a Judge an order *nisi*, made absolute on the 8th of July, for the delivery to them of the timber subject to the payment (which does not then appear to have been made), of the costs and charges under the order of the 27th of June in the action of *Roche and Another v. Meech*.

Connolly appealed against this order to the full Court, in consequence of which appeal the Judge declined to make any further order interfering with his possession of the timber. The appeal stood over for hearing during the long vacation, and was heard on the 6th of September, when it was dismissed. *Connolly* thereupon delivered the timber to the *Maclarens*, the defendants, who offered to deliver it to the *Murphys*, the plaintiffs, they however refused to receive it in consequence of a fall of the price of timber in the meantime, and commenced the present action.

The question turns upon the construction of the words of the 274] *contract "to be delivered . . . to morrow or as soon as they can be got out of the hands of the guardian."

It appears to have been admitted on the part of the defendants that they were bound to use due diligence in order to effect this, and on the part of the plaintiff that they were guilty of no default in this respect.

It was contended on the part of the respondents, that the duty of the *Maclarens* to deliver the timber became absolute as soon as the guardianship in the first suit was legally determined, or at all events as soon as *Connolly*, or whoever, might be guardian, ceased to have the legal right to hold it as such in either suit — that when *Forsyth* was appointed, *Connolly's* legal right to hold ceased, or that, at all events, it ceased upon the Judge's order of the 8th of July being made. On the part of the appellants it was contended that the *Maclarens* undertook no more than to deliver the timber as soon as they in fact got it out of the custody of the guardians, whether the guardian held possession legally or otherwise; that they did not, in fact, get it out of the hands of the guardian into their own, so as to be able to deliver it, till the 6th of September, when they offered to deliver it.

Their Lordships are sensible of the difficulty which frequently arises of defining the meaning of mercantile contracts, wherein, as in the present case, the parties are content to express themselves in loose and inaccurate language, and it is not without some hesitation that they have come to the conclusion that the construction of the contract contended for by the Appellants, the *Maclarens*, is the correct one. When the contract was made both parties to it knew that the timber was in the hands of a guardian or guardians appointed by law, and (as has been before intimated) their Lordships agree with the Court of Queen's

Bench that they must be taken to have known *Connolly* to be the guardian or one of the guardians. The time was uncertain when it could be got out of the hands of the guardian so as to enable the *Maclarens* to deliver it, that time might arrive the next day, or it might not arrive for more than a week, in which latter case the purchaser was protected from loss by being enabled to refuse the timber. Their Lordships think that it is not a reasonable interpretation of the contract, to hold it to mean that the *Maclarens* bound themselves to deliver the timber, upon *the accrual of the legal right to the possession—a right [275 which might involve legal difficulties, and which they could only enforce by action—and that it is rather to be inferred from the common and simple language used that, as between mercantile men, the actual and not the constructive, “getting out of the hands of the guardian,” was intended. It appears, therefore, to their Lordships that the timber was not “got out of the hands of the guardian” within the meaning of the contract until September; that the *Maclarens* were guilty of no default, and are not liable in damages to Messrs. *Murphy*. This view of the case makes it unnecessary to determine whether or not (as has been suggested) *Connolly* was acting fraudulently and in collusion with Messrs. *Roche* or their attorney. *Connolly*’s legal right to detain as guardian terminated when *Forsyth* was appointed in his place, but he had also been served with a writ which required him to hold as garnishee all goods of *Meech* in his possession, and their Lordships think it by no means necessarily to be inferred that he acted fraudulently or collusively, because he did not undertake to determine that *Burstall*’s claim to the timber, as the goods of *Meech* was unfounded, and that the order in the former suit for delivery to the *Maclarens* gave them a conclusive title against all the world. Upon the order being made of the 8th of July *Connolly* would have been protected in giving up the timber, and it would have been proper of him to do so. His appeal against that order may be regarded as obstructive; nevertheless, in appealing he exercised a legal right, and until the appeal was decided he did, in fact, hold the timber under a claim to hold it by authority of the law.

It has been suggested that the undertaking by him on the 1st of July to hold to the order of the *Maclarens*, constituted a contract whereby he became their warehouseman or wharfinger, and that thereafter his possession after that date was virtually theirs. Independently, however, of the question whether there was any consideration for such a contract, it appears to their Lordships that *Connolly*’s evidence to the effect that he was induced to give the undertaking under a misapprehension caused by a misrepresentation of fact by the bailiff and one of the

Maclarens, uncontradicted as it is by either of these persons, must be taken to be true; and, if so, although the misrepresentation may not have been *intentionally, it seems to their Lordships that *Connolly* was not bound by this undertaking, and that the character of the possession was not changed by his giving it.

For these reasons their Lordships will humbly advise Her Majesty, that the judgment of the Court of Queen's Bench be reversed, and that of the Court below be affirmed, and the appellants will have the costs of the appeal.

Judgment on the appeal of *Connolly v. Maclarens*, from *Canada*, was delivered, as follows, at the same time:

This was an action brought by the Messrs. *Maclarens* against Mr. *Connelly*, "*en garantie*," alleging that, in consequence of his wrongful detention of a raft of timber, of which they were the owners, they were unable to deliver it to Messrs. *Murphy*, in pursuance of a contract of sale to them; that Messrs. *Murphy* sued them for breach of contract and recovered damages, whereupon the defendant was bound, as "*garant*," to indemnify them. Inasmuch as their Lordships have held in the principal suit that Messrs. *Murphy* had no cause of action against Messrs. *Maclarens*, they are of opinion that the foundation of this action fails, without determining whether or not the *Maclarens*, or any persons to whom by sale from them the property in the timber passed, might have a remedy by original action against *Connelly* for his detention of it. Their Lordships, therefore, will humbly advise Her Majesty to reverse the judgment of the Court of Queen's Bench, and to affirm that of the Court below; the Appellant will have the costs of this appeal.

Solicitors for the Appellants in the first appeal, and the Respondents in the second appeal: *Uptons, Johnson, Upton, & Budd*.

Solicitors for the Respondents in the first appeal: *Bischoff, Bompas, & Bischoff*.

Solicitors for the Appellants in the second appeal: *Clarke, Son, & Rawlins*.

J. C.* June 14, 1872.

TREFFTZ & SON, Appellants;

AND

ANTONIO CANELLI, Respondent.

[Law Reports, 4 Privy Council Cases, 277.]

ON APPEAL FROM THE SUPREME CONSULAR COURT OF CONSTANTINOPLE.

Mercantile contract, construction of — Gratuitous Bailee — Negligence — Laches.

C, a merchant domiciled at *Alexandria*, being indebted to the appellants, merchants carrying on business at *Leipsic*, for the purpose of setting litigation be

* *Present* :—SIR JAMES WILLIAM COLVILLE, SIR MONTAGUE EDWARD SMITH, and SIR ROBERT PORRETT COLLIER.

tween them deposited with the respondent (an English merchant resident at *Alexandria*) certain bills drawn in his favor as security for the appellants' debt; the respondent by the agreement between *C* and the appellants constituting himself a voluntary depositary of them, and undertaking to be responsible for them to the appellants "until the effective encashment of them, which remains intrusted to *C*":

Held, that the respondent was not guilty of a breach of duty under this agreement in allowing *C* to take the bills when due, for encashment at his discretion, and was not bound to see that *C* handed over the money to the appellants.

In this case the appeal was brought from a decision of the Supreme Consular Court of *Constantinople*, which reversed a judgment of the Consular Court of *Alexandria*.

The judgment in the Consular Court of *Alexandria* was in favor of the appellants. The Supreme Consular Court of *Constantinople* reversed that judgment.

The plaintiff, *Edward Wallers*, as representing the appellants, merchants at *Leipsic*, in the Consular Court at *Alexandria*, claimed from the respondent 12,000 francs, or 5,543 florins, about £480, the amount of two bills of exchange mentioned in a contract, which was in the Italian language, of which the following is a translation:

"In the year 1865, on the 21st day of October, at *Alexandria* in *Egypt*.

"By the present private agreement the following has been agreed upon between the undersigned advocate, *Francesco Salone* *as agent of the commercial firm, *J. T. Trefftz & Son*, [278 of *Leipsic*, as per deed of the 31st of May, 1865, and Mr. *C. B. Chilaiditi*, representing the commercial firm, *C. B. Chilaiditi & Co.*, established at *Alexandria*.

"Mr. *Salone* in his above mentioned character making use of the powers granted to him by virtue of the above mentioned power of attorney, received from Mr. *C. B. Chilaiditi* the following proposition, in order amicably to settle the litigation in this Consular Tribunal of *Greece*, whereby it is sought to compel payment by the firm, *C. B. Chilaiditi & Co.*, to the house of *J. T. Trefftz & Son*, of the sum of 10,140 silver florins and five cents, for the equal amount of goods consigned on the 15th of March, 1865, besides interest until the complete payment, and also for the judicial costs and charges up to the present date.

"1. *Mon. Chilaiditi* declares himself to be indebted to the house of *J. T. Trefftz & Son* in the sum of 10,505 silver florins and 9 cents, as well for principal as interest, at the rate of 6 per cent. from the 15th of March up to this date, in addition to the sum of 249 francs being legal expenses up to this date, the costs of the present instrument not being included.

"2. In payment of the above mentioned sum, less the legal expenses, which he will pay by cash, he will deposit into the hands of Mr. *Salone*, in his above mentioned character, four

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bills to his order signed in favor of Mr. *D. Piazza*, the original agent of the house of *Treffitz*, as per deed of the 31st of May, 1865, signed *F. Salone*, *C. B. Chilaiditi*, namely, one of 2,652 silver florins and 80 cents, payable at two months' date, another of 2,679 silver florins and 86 cents, payable at four months' date, a third of 2,707 silver florins and 49 cents, payable at six months' and the last of 2,735 silver florins and 69 cents, payable at eight months' date, there are included in these sums the respective interest at the rate of 6 per cent.

"3. In guarantee of these four drafts Mr. *Chilaiditi* deposits into the hands of Mr. *Antonia Canelli*, an English merchant, residing in this place, who, for this purpose, intervenes in the present instrument, the following bills of exchange in his own favor, signed by native merchants of this place indebted to him, namely:

279]	*"	No. 8	One of <i>Hamudi Kamal</i>	P. T.	30,243
		" 3	Do <i>Ibrahim Deliver</i>	"	19,093
		" 7	Do <i>Maham Effendi Azar</i>	"	20,397
		" 4	Do <i>Abdul Melak of Cuero</i>	"	35,000
					<hr/> 104,733 <hr/>

"4. Mr. *Canelli* constituting himself a voluntary depositary of the above mentioned bills of exchange makes himself responsible for them, or for the amount which they represent, to the house of *Treffitz*, until the effective encashment of them, which remains intrusted to Signor *Chilaiditi*.

"5. Mr. *Salone* in this character accepts the above-mentioned propositions.

"Done this day, month, and year, as above, in triplicate, signed by the parties.

" Mere Depositary.	(Signed)	<i>A. Canelli.</i>
	(Signed)	<i>Costa B. Chilaiditi.</i>
	(Signed)	<i>Francesco Avo. Salone."</i>

The above contract was put in and proved at the trial before the Consular Court of *Alexandria*, and it further appeared on the trial, that two of the bills mentioned in the second paragraph of the contract, not having been paid by *Chilaiditi*; *Edward Wallers*, the appellants' agent, demanded payment of them from the respondent on the ground that by the terms of the contract he had guaranteed the payment of the bills. The respondent was examined on his own behalf, and proved that he was a mere gratuitous bailee of the bills deposited with him, and that, in accordance with the express terms of his undertaking, he allowed *Chilaiditi* to take the bills for encashment.

It was admitted that the respondent gave the bills deposited with him to *Chilaiditi* for encashment as they became due.

The question in the Courts below was the extent of the liability undertaken by the respondent under the above contract.

The Consular Court of *Alexandria*, on the 14th of April, 1869, decided in favor of the appellants. That judgment was reversed by the Supreme Consular Court of *Constantinople* on the 27th of September, 1869. Hence this appeal.

*Mr. A. Cohen, for the Appellants:

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There was sufficient consideration to support a promise or undertaking on the part of the respondent to carry out the terms on which, and the purpose for which, he became depositary of the bills in question, and the facts proved in the Court below showed that he had made default in doing so. He was bound to use proper care in keeping the bills, to keep them till the effectual encashment, and not to give them up to *Chilaiditi* until he was sure that he could cash them, and the money was paid into his or the appellant's hands. The forbearance was a sufficient consideration. The plaintiff cannot prove negligence in a case of this nature, the burden of proof, therefore, is shifted on the defendant: *Pothier, Traité du Contrat* [*Bugnet's Ed.* 1847], tom. v. art. 3, sec. 52; *Code Napoléon*, art. 1993; *Coggs v. Bernard* (1); *Taylor on Evidence*, p. 379, § 347 [5th ed.].

Mr. Butt, Q.C., and Mr. P. Kent, for the Respondent:

Canelli was a mere gratuitous bailee of the bills, he received no commission or remuneration of any sort for becoming depositary of the same, and was by the 4th article of the contract bound to deliver them up when demanded by *Chilaiditi* for encashment. He only held them that *Chilaiditi* might not be tempted to use them while in difficulties, and as an evidence of good faith. The firm of *Trefftz & Son* did not apply for them till many months after the dishonor of *Chilaiditi's* own bills. It lay upon the appellants to prove a case of gross negligence if they sought to make the respondent liable, and without admitting that such negligence, if proved, would render him so, it is sufficient to say that no such negligence, or, indeed, any negligence whatever, on the part of the respondent was proved.

Judgment was pronounced by

SIR MONTAGUE SMITH:

This is an appeal from the judgment of Her Majesty's Supreme Consular Court at *Constantinople*, which reversed a judgment pronounced by the Queen's Consular Court at *Alexandria*. The *action was brought by Messrs. *Trefftz & Son* against [281

(1) 1 Smith's L. Cases, 177 [8th ed.]

Mr. *Canelli* for breach of a contract into which he had entered or intervened, under which certain bills of exchange were deposited with him for the purpose of securing the payment of certain other bills which had been given by a person of the name of *Chilaiditi* to Messrs. *Treffitz & Son*. *Chilaiditi* was indebted to *Treffitz & Son*, and an action had been brought by them against him. That action was discontinued upon *Chilaiditi* giving certain bills to *Treffitz & Son*, and agreeing to deposit with Mr. *Canelli*, the defendant, certain other bills by way of security.

The main question arises upon the proper construction of the agreement under which the bills given as security were deposited with Mr. *Canelli*. The contract is by no means an intelligible one, and some difficulty has been felt by their lordships in ascertaining from the words of it what was the real intention of the parties; but it is obvious that the obligation of the depositary cannot be carried further than the language of the contract will warrant, and their lordships must find, as well as they can from the language used, what was the intention of the parties.

The agreement was made in *Alexandria* on the part of *Treffitz & Son* by an agent, Mr. *Salone*, and bears date on the 21st of October, 1865. It was made between the two principal parties, and Mr. *Canelli* intervened. The first part of the agreement relates to the action which had been brought and the compromise of it, and the delivery of certain bills by Mr. *Chilaiditi* to *Treffitz & Son*. Those bills are referred to in the second clause of the contract, which says, "In payment of the aforesaid sum," that is, the agreed debt exclusive of the costs, which are to be paid in ready money, "he," that is the debtor, "will place in the hands of Mr. *Salone*, in his (Mr. *Salone's*) aforesaid capacity, four bills respectively accepted by him in favor of Mr. *D. Piazza*, the original attorney of the firm of *Treffitz & Son*." Then there is a description of the bills, the last of them maturing in eight months from the date of the contract. The other clauses contain the obligation, and the only obligation, into which Mr. *Canelli* entered; the third is in these terms: "As security for the said four bills, Mr. *Chilaiditi* deposits in the hands of Mr. *Antonio Canelli*, an English merchant residing in this place, who for that 282] purpose becomes a party to *this instrument (intervenes), the following bills, drawn in his own favor, and accepted by certain native merchants of this place who stand indebted to him, viz. :"—The bills are described, and the names of the parties, and the amounts given. Then it goes on: "4th. Mr. *Canelli*, constituting himself the voluntary depositary of the aforesaid bills, undertakes to be (render himself) responsible for the same, or for the value represented by the same, to the firm of *Treffitz & Son* until the effectual encashment thereof, which encashment

is entrusted to Mr. *Chilaiditi*." Mr. *Canelli* signs in this way, "the depositary only, A. *Canelli*."

Now, two constructions have been suggested of this agreement. Mr. *Cohen*, on the part of the plaintiffs (the appellants), maintains that the words "until the effectual encashment" of the bills meant that the bills should remain deposited with Mr. *Canelli* until they had been paid, and the money had come into his or Messrs. *Trefftz & Son's* hands. The other construction, supported by the passage following the words I have just read, namely, "which encashment is entrusted to Mr. *Chilaiditi*," is, that the bills were to be held by the depositary only until the time for effectual encashment came, and were then to be entrusted to Mr. *Chilaiditi* for the purpose of obtaining payment, and that when that had been done, it was contended that the deposit was at an end.

The contract is certainly not very intelligibly expressed, and it becomes necessary to examine its words, to ascertain what interpretation they most naturally bear. If it had stopped at the words, "until the effectual encashment thereof," there would have been strong ground for contending that the parties meant that the depositary should hold the bills until he got payment of them. But the contract does not stop there. It goes on with the passage I have just read, and to which effect must be given, as well as to the former part. The construction which appears to their lordships to be that which the words naturally import is, that Mr. *Chilaiditi* was to be entrusted with the possession of the bills in order to obtain payment; and if that is the meaning of the parties, the responsibility of the respondent as depositary would end, when the former was so entrusted.

The agreement seems to be hardly susceptible of any other construction than of these two, and it may be observed that both are *sensible constructions; that is, both give an effect [233 to the agreement which is a beneficial one to the creditors, Messrs. *Trefftz & Son*. One is much more beneficial to them than the other, and would give them a much greater security; but still both give them some security; and the question is to collect, as well as can be done from the language, what it was the parties really meant, and what was the obligation Mr. *Canelli* undertook, because no Court can carry his obligation further than the words to which he has become a party will allow, even although it may be that the agreement is not one which mercantile men would be expected to enter into.

It is suggested by Mr. *Cohen* that there would be no advantage in the agreement if it be construed in the way in which the respondent's council seeks to construe it; but, as just said, that really is not so. The bills which were given by Mr. *Chilaiditi*

to *Treffitz & Son* matured in eight months from the date of this agreement. The bills which were deposited as a security, apparently, did not mature for a year and a half after its date. The benefit which was secured to Messrs. *Treffitz & Son* by this agreement was at all events to this extent, that bills of their debtor to an amount exceeding the amount of the bills which he had given to them remained in the hands of a depositary up to and beyond the time when these last became due, and the debtor was prevented from parting with that property. It remained locked up under this agreement, and they might by proceedings against Mr. *Chilaiditi* when his own bills were dishonored, have very probably obtained in some way the benefit of those which were deposited as security with Mr. *Canelli*.

Their Lordships, therefore, think that a sensible construction may be given of this agreement, and that they best give effect to all the words and the different parts of it, by adopting that which has been put upon it on the part of the respondent.

If the construction of the appellants were to be adopted, it would impose upon Mr. *Canelli* a greater obligation than he undertook. He does not undertake to hold the money or to be the depositary of the money. The agreement is, that he will be responsible for the bills, or for their value, until the effectual encashment thereof. He does not undertake to be a depositary of the money, or that his obligation under this contract shall 284] endure *for all time. Undoubtedly, a difficulty might arise in the practical working of this agreement, if Mr. *Chilaiditi*, being entrusted with the bills, presented them and they were dishonored. Possibly that is a state of things which was not foreseen. The experience of those who have had to deal with mercantile contracts teaches that they are not uncommonly entered into without an apprehension or foresight of all the circumstances which may result from them. It may be said that if Mr. *Chilaiditi* had presented the bills and they were dishonored, there might have been implied from this contract an obligation on his part to return the bills to Mr. *Canelli*, and on the latter to retain the custody of them as a continuation of the original deposit. However, it is not necessary to decide that question.

Assuming, then, the construction of the contract to be, that which their Lordships have declared it in their opinion to be, the only remaining question is, whether the plaintiff had established a breach of the contract so construed.

Now it appears to their Lordships that it lies upon the plaintiff to establish that there has been on the part of Mr. *Canelli* some breach of his duty under the contract. There would have been a breach of his duty under it if he had delivered the

bills to Mr. *Chilaiditi* before the time when they ought to have been presented for payment, or if he had delivered them to him for any other purpose than that of obtaining payment. But their Lordships think, upon looking at the evidence in this case, that the plaintiff has not shown that there was a breach on the part of Mr. *Canelli* in either of these respects. The evidence is extremely scanty, and their Lordships would scarcely be able to arrive at what were the facts of the true case unless they availed themselves of the judgment which was delivered by the consul at *Alexandria*. Looking at that judgment, and reading the evidence by the light of it, it sufficiently appears, in their Lordships' view, that the bills were delivered by Mr. *Canelli* to *Chilaiditi* for the purpose of being cashed, and also that they were paid.

Assuming those to be the facts, that the bills were delivered by Mr. *Canelli* to *Chilaiditi* for the purpose of being cashed, and that he did obtain payment of them, their Lordships think that there was no breach of duty on the part of Mr. *Canelli*, and that nothing *can be imputed to him which would give a cause [285 of action to Messrs. *Trefftz & Son*.

It was urged by Mr. *Cohen* that Mr. *Canelli* had been guilty of negligence in allowing Mr. *Chilaiditi* to help himself, as it were, to the bills, by going to the chest where they were kept, and taking them from it. Assuming that there may have been some want of care in that respect, or some undue confidence placed by Mr. *Canelli* in Mr. *Chilaiditi*, that alone would not make Mr. *Canelli* liable, unless Mr. *Chilaiditi* got possession of the bills for a purpose which the agreement did not warrant. But if it be right to assume upon the evidence, and upon the assumptions in the judgment, that Mr. *Chilaiditi* had these bills only at the time when they became due, and only for the purpose of getting them paid, the fact that he was allowed to take them himself, and that there might have been some want of care in that respect in allowing him to handle all the bills, would, their Lordships think, afford no ground of action, when that negligence was not followed by any consequences affecting the interests of Messrs. *Trefftz & Son*.

The consul at *Alexandria* appears to have construed the contract as their Lordships have done, and certainly not in the way in which Mr. *Cohen* attempted to interpret it at their Lordships' bar. But the consul appears to have thought that by implication the agreement imposed an obligation upon Mr. *Canelli*, either to take care that Mr. *Chilaiditi* did receive the money and hand it over to Messrs. *Trefftz & Son*, or to give notice to Messrs. *Trefftz & Son* of the time when the bills matured, and of his having delivered them to Mr. *Chilaiditi* in order that they might

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go with him and obtain the money when it was paid. It seems to their Lordships that this is not a necessary, or even a reasonable, implication from this agreement. There are no words which affect to bind Mr. *Canelli* to any such duty, and their Lordships think that there is no laches which amount to anything like a breach of duty under this agreement, it is not accompanying Mr. *Chilaiditi* when he received the money, or in not giving notice to Messrs. *Treffiz & Son*, or some agent of theirs, that Mr. *Chilaiditi* had possession of the bills for the purpose of obtaining payment.

As far as laches is concerned, their Lordships are clearly of 286] *opinion, that there is far greater neglect on the part of the appellants themselves than on the part of Mr. *Canelli*. The object of the agreement appears to have been that Mr. *Canelli* should hold these bills until effectual payment could be obtained. The bills are described in the agreement, and Messrs. *Treffiz & Son* knew perfectly well, or ought to have known, or taken care to have known, the time when these bills would have matured. It seems reasonable to expect that they, with a due regard to their own interests, would have taken care to see that Mr. *Chilaiditi* if he obtained the bills and the cash for them, would hand over the cash to them. It seems to their Lordships, that they have no right to cast that duty, which was one that they might have been fairly expected to undertake for their own interest, upon Mr. *Canelli*, and make him responsible for the consequences of leaving Mr. *Chilaiditi* in the uncontrolled possession of these bills.

Their Lordships, therefore, have come to the conclusion, that the Supreme Consular Court at *Constantinople* was right in reversing the judgment of the consul at *Alexandria*, and they will advise Her Majesty to dismiss this appeal with costs.

Solicitors for the Appellants: *Thomas & Hollams*.

Solicitors for the Respondent: *T. Russel Kent*.

April 29, 1872.

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*THOMAS TANHAM, Plaintiff in Error;

AND

JOHN ARMITAGE NICHOLSON, Defendant in Error.

[5 House of Lords Cases, 561.]

Ejectment — Notice to Quit — Servant — Agent.

The service of a notice to quit made at the house of the tenant upon a person whose duty it would be to deliver the notice to the tenant, is sufficient to sustain ejectment, although in fact the notice was never delivered to the tenant.

The presumption in such cases is that it did reach the tenant himself.

In such a case the question is not whether the servant performed his duty in delivering it to his master, but whether the servant was to be considered as the

agent of the master to receive the notice. If he was, the service of the notice will effectually bind the master.

Per THE LORD CHANCELLOR (Lord Hatherley):—The fact that the agent who received the notice destroyed it would liberate entirely the person who delivered the notice, but would not liberate the person whose agent had received and destroyed it.

Per LORD WESTBURY:—Where there has been service of a notice to quit left at the tenant's house with a servant of the tenant, such a fact is more than presumptive evidence of a service on the tenant. The landlord's right would otherwise be controlled by something to which the landlord was an utter stranger.

Per LORD WESTBURY:—But even if only presumptive evidence of the service, the evidence to rebut it must be proof of the fact that the notice did not come to the knowledge of the tenant at all.

T lived in a house where his two sons and his daughter also resided. *T* was imbecile. The house was managed by his daughter, the farming business by his two sons. A notice to quit, addressed to the father, was served at the house by delivery to the daughter. She put it on the dresser in the kitchen, and afterwards burnt it. One of the sons knew of its existence, but was not shown to have known its exact terms, though he was aware of its nature:

Held, that this was a service sufficient to entitle the landlord to maintain ejectment against the father.

This was a proceeding in error on a judgment of the court of Exchequer Chamber in *Ireland*, which had reversed a previous judgment of the Court of Queen's Bench in *Ireland* (1).

Nicholson brought an ejectment on title against *Thomas Tanham*, for lands situate in the barony of *Upper Kells*, in the county of * *Westmeath*. The cause was tried before Mr. Justice [562] *Lawson*, at the Summer Assizes at *Trim*, in 1869. The plaintiff claimed as landlord under a conveyance from the Landed Estates Court. The defendant was the tenant from year to year of between nine and ten acres of land; and the only real question in the case was as to the sufficiency of the service of the notice to quit. The notice was dated on the 10th of April, 1868, and required the tenant to quit "at the end of the year of your tenancy which shall expire next after the end of half a year from the time of your being served with this notice." *Byrne*, the plaintiffs' bailiff, swore that he had "delivered the notice to the daughter, at the house of her father, on the lands."

At the close of the plaintiffs' case the defendant's counsel asked for a nonsuit on these grounds — that there had been no proper service of the notice to quit; that *Thomas Tanham* was *non compos*, and could have no agent; and that when the notice was delivered to the daughter there was no explanation of it given to her. His Lordship refused to nonsuit, and witnesses were then called for the defence. *Rosa Tanham*, the daughter, said she had received a paper from the bailiff. She did not read it. He asked her how her father was, and she said "quite innocent" (which was explained to mean imbecile). She threw the paper on the dresser and afterwards burned it. Her two brothers managed the farm. She thought they saw the paper:

(1) 4 Ir. Law Rep., Com. Law, 185.

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They were both in the house. They could read. *Patrick Tanham*, the eldest son, thought he had never seen the paper. His brother *Tom* told him of it, and said, "We got the notice to quit." *Thomas Tanham* had never spoken to his father about the paper; the father knew nothing of it. The learned judge again refused to nonsuit, but said he would leave to the jury the question, "Whether in fact, the notice to quit ever reached *Thomas Tanham*, or became known to him?" The jury found in the negative. His Lordship, however thinking the service of the notice sufficient in law, directed a verdict to be entered for the plaintiff, subject to leave to move the Court for a new trial, or to enter the verdict for the defendant. A rule was obtained and was made absolute for a new trial. On error to the Exchequer Chamber the decision was reversed. The case was then brought up to this house on error.

563] **Mr. Isaac Bull*, Q.C., and *Mr. Patrick Martin* (both of the Irish bar), for the Plaintiff in error :

There was here no sufficient service of the notice to quit. It may be assumed, for the purpose of this argument, that the tenant was living in the house where the notice was served, and that the house was part of the demised premises. These two facts are no doubt important, but much more is required to constitute a good service of a notice to quit, so as to entitle a plaintiff to proceed in ejectment. The law requires that a notice shall be brought to the actual knowledge of the person against whom it is to be used. If the notice is not given to the person himself it must be shown to have reached his hands, so that he was aware of its being given, or it cannot be said to be a notice. If there is a recognized agent of that person, notice clearly given to the agent will of course bind the principal. Short of this there can be nothing which deserves the character of notice. Here there was no notice to the tenant himself, nor was there any agent qualified and entitled to receive notice, so as to bind the tenant. It is true that in *Jones d. Griffiths v. Marsh* (1) Lord *Kenyon* said that personal service was not necessary; but his observation is to be interpreted by what *Mr. Justice Buller* intimated in the same case, that service not personal only raised a presumption, and that the servant, on whom the notice was served, not being called to show that it did not reach the master, the presumption would be that it did so. That showed that service on some one else was only *prima facie* evidence of notice, which might be rebutted, and which ought to be substantiated, and that whether it reached the party or not was an inference of fact, and consequently was something that became the subject

(1) 4 T. R., 464.

of evidence and ought to be left as a question of fact to the jury. In *Doe d. Buross v. Lucas* ⁽¹⁾ Lord *Ellenborough* put that interpretation on the previous case, and there being in the case before him no evidence that the notice did reach the master, he held the alleged service to be insufficient. In the present case no evidence of that kind was offered. All the evidence that was received went to show that the notice could not and did not reach the tenant's hand, for *Rosa Tanham* swore that she never gave the notice to her father, and that he knew nothing whatever of it. *Doe d. Neville v. Dunbar* ⁽²⁾ shows *that what [564 has been done here is not sufficient, for there, though late, the notice did reach the tenant himself, and so was held sufficient. Where the tenant is absent from the premises a different question would arise, and there must be some person who could, as the tenant's agent, receive the notice in his absence. [THE LORD CHANCELLOR :—Suppose the tenant was in *extremis*.] Then it would be for the Judge to say whether what had been done was sufficient to satisfy the requisition of the law, and to leave the facts to the jury. There might be cases in which that would be the proper course to pursue : *Doe d. The Commissioners of Education v. McLaughlin* ⁽³⁾, where the decision really went on the ground that, in fact, the notice did come to the tenant's hands. In *Smith v. Clark* ⁽⁴⁾ the service was held sufficient, but there it was served on the wife at the house of the husband, and the nature of it was explained to her. There was no explanation of it here. In *Alford v. Vickory* ⁽⁵⁾ it was held that a notice must at least be shown to have come to the hands of the tenant before the expiration of the period mentioned in it. Here there was not any evidence of that kind. [THE LORD CHANCELLOR : Your argument would come to this, that there must always be personal service.] If personal service could be had that would be the best, but when that was not possible it should be shown that the notice came to the hands of the intended person. *Papillion v. Brunton* ⁽⁶⁾ was not opposed to this argument, for that was a mere question whether the notice, which undoubtedly came to the hands of the agent, had reached him in proper time.

Of course where there were several tenants in common, all having the same interest, and one alone lived on the premises, service on him would be sufficient, for service on all might be impossible; and the proper presumption would arise there that the knowledge of it had reached all. But in all cases where the tenant could be personally served personal service

⁽¹⁾ 5 Esp., 153.

⁽²⁾ Mood. & M., 10.

⁽³⁾ 1 Fox & Sm., 60.

⁽⁴⁾ 9 Dowl. Prac. Cas., 202.

⁽⁵⁾ Car. & M., 280.

⁽⁶⁾ 5 H. & N., 518.

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was required: *Adams* on ejectment ⁽¹⁾; *Furlong* on landlord and tenant ⁽²⁾.

These were cases that directly bore on tenancies. In cases of a different kind a similar rule prevailed. Thus, in an action for 565] an *attorney's bill, service on the bill on a servant at the house of the defendant was treated as equivalent to service on the defendant himself: *Macgregor v. Keily* ⁽³⁾; but only because the servant might have been called to show that he had not delivered it to his master. [LORD WESTBURY:—Did not this notice reach the daughter, an acknowledged agent of the father?] It ought to have reached his hands. This case ought to be decided independently of presumption. There was nothing to show that the daughter was an agent of the father. [LORD WESTBURY:—And the brothers? It certainly reached the hands of one of them.] There can be no presumption on that point. The facts displace it. There was no service on the son; there is only a presumption that he knew of the notice. But, even assuming the son to have known of it, can a service on the son in any way whatever be sufficient to put an end to the tenancy of the father. It is clear that the father had not appointed the son his agent—there is no evidence to show that he had—there is evidence to show that the father could not have appointed him, for the father was imbecile. [LORD WESTBURY:—In law the question is, whether the notice came to the knowledge of the tenant. The presumption under such circumstances as exist here, is that it did. You are bound to show that it did not.] The Judge left it to the jury to say whether the notice reached the hand of the tenant, and the jury said that it did not. Yet the Judge directed the verdict to be entered for the plaintiff. That was erroneous. The daughter directly contradicted the presumption that she might have delivered the notice to her father, for she said she had thrown it on the dresser, and she afterwards burnt it. [THE LORD CHANCELLOR:—Would the misconduct of the servant be an answer in such a case?] It would; at all events where the servant was only impliedly and by inference, and not really, filling the character of an agent. Perhaps, too, the daughter could not read, and did not understand the notice. And there was no proof here, as in some of the cases, that it was explained to her. In all other cases a notice must reach the hands of the person to be affected by it. In *The British and American Telegraph Company v. Colson* ⁽⁴⁾ the defendant had applied for shares. A notice of allotment of shares was sent to him by post. He gave evidence that 566] *he had never received the notice, and he was held not

⁽¹⁾ Page, 94.

⁽²⁾ 2nd edit., p. 621.

⁽³⁾ 3 Ex., 794.

⁽⁴⁾ Law Rep., 6 Ex., 108.

to be bound by it. So in *Reidpath's Case* ⁽¹⁾ it was held that the mere posting of an allotment of shares to an applicant at his proper address, was not such a communication of the allotment as to be binding on him.

All the cases establish the principle that where a notice is required to be given, proof that the party himself received it, or that it was received by his duly appointed agent, must be produced.

Sir *R. Palmer*, Q.C., and Mr. *Battersby*, Q.C., and Mr. *O'Driscoll* (the last two gentlemen were of the Irish bar), were for the defendant in error :

There is no such rule as that a notice to sustain an ejectment must be personally served on the tenant. In *Doe d. Neville v. Dunbar* ⁽²⁾, Lord Chief Justice *Abbott* held that such a service as was proved here was absolutely sufficient. In some cases personal service of a notice or proof of actual knowledge of it would be impossible, as for instance, where the tenant lived abroad. In general, service at the house itself is sufficient. But here the sons and daughter were the agents of the father ; there was no necessity for him formally to confer that character on them — they were so by the force of circumstances — they were in fact the persons managing the house and farm for him, he being incapable of managing either for himself. Under such circumstances the service on the daughter at the house where her father resided was amply sufficient. Personal service is not required except when a person is to be made criminally responsible. And, as to the objection that the father here was an imbecile, in *Mellersh v. Keen* ⁽³⁾ a notice to dissolve a partnership given to the lunatic partner was held sufficient, the master of the rolls there founding himself upon *Robertson v. Lockie* ⁽⁴⁾, where the same rule had been applied, and his Lordship in reviewing the principles which related to giving notice, expressly referred to a notice to quit as an instance where such a service as occurred here would be sufficient. The cases referred to on the other side as to notices of allotments of shares really strengthen this argument.

Mr. *Butt* replied.

*THE LORD CHANCELLOR (Lord *Hatherley*) :

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My Lords, we have, I believe all of us, felt it only to be due to the respect which we must feel for judgments of the Court of Queen's Bench and of the Court of Exchequer Chamber in *Ireland*, to hear this case fully argued and discussed, and we have had the great advantage of hearing it most ably discussed

⁽¹⁾ Law Rep., 11 Eq., 86.

⁽²⁾ Moo. & M., 10.

⁽³⁾ 27 Beav., 236-241.

⁽⁴⁾ 15 Sim., 285.

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and most fairly put before us by the learned counsel who has addressed us on behalf of the appellant. I think he did not in any way overstate his case, or the line of authorities to which he referred in support of his case. But it appears to me that he has entirely failed to establish as the result of those authorities that the direction given by the learned Judge who tried this case was a wrong one, or that the conclusion at which the jury, under that direction, arrived was a wrong one.

The sole question in the case is an extremely short one, and it is simply this, whether or not the delivery of a notice to quit on one who, undoubtedly, according to the evidence, was a servant of the tenant, at the house of the tenant, that house being on the demised property, is to be taken as a good and effectual service of that notice, so as to subject the person to whom it is addressed to the consequence of being ejected upon the termination of the notice.

The line of argument which Mr. *Butt* has taken, which is a very ingenious one, is this: I will first show you, he says, that the service of a notice to quit upon the servant living at a dwellinghouse, although by law it is a service that may be established to be in itself a good service, is nevertheless not conclusively established as a good service if one of two things occurs, namely, if either the defendant, having had service of such a notice as this, proved by the service upon his servant, produces that servant, and shows by the evidence given by that servant that the notice never reached him; or if he is able to displace the fact of that servant being a person who would be authorized in law to receive a notice of this description.

Now, with regard to the servant being a person who would be authorized in law to receive such notice, I think Mr. *Butt* conceded at once that a servant of a tenant living at the house upon the property demised would be a proper agent for the purpose of *receiving a notice of this description. But he said it would only be a *prima facie* case, raising a presumption, and a strong presumption, as he said, that the notice reached the employer. And for this he cited some passages, first in an old case before Lord *Kenyon*, in which Mr. Justice *Buller* is supposed to have thrown out some expressions of that description; and in another and later case where Lord *Ellenborough* is supposed to have differed from the previous decision. And Mr. *Butt's* argument was this, that Mr. Justice *Buller* in the first case, and Lord *Ellenborough* in the next, said: True it is that the presumption of the service of the notice being a proper service upon the tenant, arising from the relation which exists between him and his servant, is a presumption of the strongest character — it will bind effectually unless rebutted by counter

evidence. But the reason given by Mr. Justice *Buller* in the old case, and by other Judges in other cases, amounts merely to this; that it is competent to the person sought to be bound by the notice to call the servant, if he thinks he can in any way explain the nature of the case, and show *de facto* that the notice never reached him. I asked Mr. *Butt*, in the course of his reply, whether any case in which there had been such counter evidence could be cited in argument, in which any such defence had been attempted and succeeded, and he candidly said he could not produce one. I was not surprised at that, because I apprehend that the real point in the case, when you come to consider it, is this; not whether or not the person you have constituted your agent, by your line of conduct, to receive any document that may be left at your house, has performed that which is his or her duty, but whether or not you have constituted that person your agent. Because, if once you have constituted your servant your agent for the purpose of receiving such a notice, the question of fact as to whether that servant has performed his duty or not, is not one which is any longer in controversy. When once you constitute your servant your agent for that general purpose, service on that agent is service on you—he represents you for that purpose—he is your *alter ego*, and service upon him becomes an effective service upon yourself.

I apprehend, therefore, that when the law has said, as it has done in repeated cases, that, for this purpose, the effective service of notice *upon a servant at the dwelling house situated [569 upon the demised property is a service upon the tenant, it has proceeded upon this ground, that the law considers that servant to be an implied agent of the tenant for that particular purpose. The only evidence by which that could be rebutted would be by your producing such evidence as you might be able to produce, to show that such an implied agency being only an implied agency was not correctly implied, and that the inference of agency was not correctly drawn from the facts proved in the case, and that consequently there was no agency. But the agency being once admitted, it is beyond all legitimate inquiry to get into the question whether the person whom you constituted your agent did or did not fail in his duty towards you. The question is, whether the other person was entitled to consider that he was dealing with you in everything that he did with the agent. Therefore the fact that the agent who received the notice put it into the fire would liberate entirely the person who delivered the notice, but it would not liberate the receiver of the notice when once the agency was established, it would not avail him as as a mode of escaping from the consequences of his having employed such an agent.

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My Lords, this individual case is really extremely simple. It does not rest upon the ordinary case of a servant residing at a house situated upon the demised property — but the facts are remarkably strong in this, that not only were there two brothers (I do not, however, think it is very important to enter into that part of the case about them) — that is not the stress of the case — the stress of the case is as to what the woman was; the woman for every intent and purpose seems to me to be peculiarly in the position of a servant of the tenant for this particular object. Because what does she say herself? She says that her father was in a weak condition of mind, and had been so for a long time. She says that she knew *Byrne* the bailiff, she says she saw him, and that she knew perfectly well who he was, she describes him in her evidence, and says; This was the bailiff of the landlord and he came to me. I will read her own words — she says, “I am the daughter of *Thomas Tanham*, he died on the 26th of May, 1868, he was very old and foolish for eight years before his death. *Tom* and *Patrick* my brothers, 570] managed the farm; *Byrne* the bailiff” — that is the *person who served the notice for the landlord: she speaks of him as knowing perfectly well who and what he was — she says “*Byrne* the bailiff gave me a paper, I did not read it.” She does not say that she could not read it, but she only says that she did not read it. “He handed it to me and asked me how my father was? I told him he was quite innocent. I threw the paper on the dresser and afterwards burned it. I did not tell my father anything about it.” Then *Byrne*, the bailiff, himself proves the delivery of this paper, and proves what it was, that it was a notice addressed to the father, who was the tenant, and that he handed this notice, so addressed to the father, to that woman, the daughter, who received it and afterwards dealt with it as she has described.

Then in cross examination the daughter says this: “We all took care of my father and managed the farm.” She herself is put there certainly in the capacity of serving her father in the matter of this very farm business. She takes care of him, and if ever there was a servant who was authorized to receive letters for a person residing on the property, and letters connected with the management of that property, certainly this daughter seems to have been so. She was peculiarly situated as the agent of her father, because she was not only so in the ordinary sense of a servant of her father, but she was so in the peculiar circumstances of his being in a weak state of mind, and her taking care of her father and managing the house. Now what more does she say about it? She did not know what it was, she had no doubt of its being addressed to her father, and she knows

that it is delivered by the bailiff, and she says that the paper was "two or three times upon the dresser." That was explained by the learned Judge as meaning two or three hours. It was a slip in the witness's language.

A little farther on your Lordships will find this, that the two brothers managed the farm, and what happened with regard to this piece of paper was this. The next witness, *Patrick Tanham*, says, "My father was foolish for nine or ten years." He says "I never saw the notice to quit, it had been burnt before, that is before I saw it, no one told my father of it. I paid the rent to Mr. *Nicholson* regularly," that is the landlord. Then he is cross-examined, and he says "I think I did not see the notice; *Tom* spoke to me of it. He can read, and said 'We got the notice to quit.'" I think, therefore, it is very plain that *Thomas* [571] saw it before it was burned, and it was burned within two or three hours after it was received. He had such knowledge of this instrument as to be able to say that it was a notice to quit, and it was not until then that it was thrown into the fire.

Now I think we have here every possible element found in the case to constitute a complete case of agency on the part of the servant as a person qualified to receive a document of this description. You have a woman living with her father, who is in a state of mind requiring assistance. You have it proved that she took care of him, and performed all her duties towards him as managing and taking care of him in the house; and as it regarded the business, she says: "We managed the farm." Whatever possible state of circumstances are required to complete the evidence of agency is proved here. There are numerous cases of persons being considered agents for the purpose of receiving notices of this description. I think the circumstance that the meaning of the notice was not declared to her might be a matter to go to the jury, and it might be a subject of comment before the jury, whether she had or had not fulfilled what it was her duty to do. But in this state of evidence your Lordships cannot doubt that she knew that she had received the document — which document we have it in evidence she knew was addressed to her father — that she knew that she had received it from the landlord's agent; and though she never read it she does not say that she did not perfectly well know the purport of it. And we find from the brother that his brother did read it and knew what it was, and he knew that he had got a notice to quit. In this state of things it seems to me that that which was proved afterwards to the satisfaction of the jury, and which no doubt was true, and the old man was not told of it, and that the document was thrown into the fire — in order, of course, that he might know nothing about it — I say

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all that is nothing to the purpose; you have the thing brought home to the agent of the person, and having brought it home to the agent, who in this case is the daughter who received this paper, you have brought it home to the tenant himself; and the tenant himself cannot be discharged from the consequences of that notice by the agent taking upon herself to withdraw the 572] notice from his knowledge, *by destroying it; it was known to the sons, who also acted as agents in the management of the farm, and that is the only observation I would make upon that part of the case. These persons who acted in the management of the farm evidently took care that the father should not know of this information which had reached them, and which being undoubtedly unsatisfactory to them they thought would be equally unsatisfactory to their father, and they therefore took care that he should not see the notice. Now, if we were to hold in this case that the notice to quit has failed in its effect because it has not reached the party's own hands, we should be laying down a new rule of law which has never been laid down before, namely, that it is absolutely necessary that the document should be brought to the person's own personal knowledge, when there was one who was constituted an agent, and whose duty it was to give him that information. I say if we were to hold that, the consequence would be that the dealing with agents in every case would be reduced to a very perilous question indeed, namely, of always depending upon whether the agent had done his duty, and not merely upon whether or not he or she was the agent. We have only one question before us, namely, whether this woman was an agent of the tenant or not, and it being established that she was an agent, we have no need to inquire whether she did her duty as such or not — that is wholly immaterial to the question.

I submit to your Lordships that the judgment complained of in this case ought to be affirmed, and the appeal dismissed with costs.

LORD WESTBURY :

My Lords, I entirely concur in the observation of my noble and learned friend, that this case has been argued with great ability, and with great fairness and candor. I agree also that though the matter in dispute is small, the case is one of very general interest, and may be regarded as a species of representative case, and therefore I think, having regard to the difference of opinion in the Court below, it was properly brought by way of appeal to your Lordships' bar.

Now the first observation I would make on the matter is this, that the alleged senility, childishness, and want of intellectual

capacity on the part of the father must be entirely laid out of *consideration. There is no fact found which is legally [573 sufficient to enable this tribunal to say that the father was in a state of entire legal incapacity. We must reason, therefore, on the assumption that the father was capable of understanding the subject matter.

I regret very much to find that the law is in the state in which it is with regard to the service of notices to quit as between landlord and tenant. Undoubtedly landlords stand in a situation of peculiar difficulty if those things are established by law which the Judges in the Court of Queen's Bench in Ireland appear here to have thought to be established; and if the landlord is bound by the view of the matter which they apprehend ought to prevail. If the landlord has once done that which the law throws upon him the obligation to do, his rights consequent upon having performed that legal duty ought not to be affected in any manner whatever by that which is done by his antagonist, upon whom the notice has been served. It would be an idle thing to say that a landlord serving a notice in due manner according to law, is to be deprived of the benefit of what he has done by the wilful act of the servant of the tenant, or by the incapacity of that servant, or by any accident that may befall the notice after it has been received in the dwelling house of the tenant on whom it was served. And there is no trace of anything of that kind in the earlier cases that have been referred to. In the original case of *Jones v. Marsh*, Lord *Kenyon* lays it down as beyond the possibility of dispute that in every case the service of a notice by leaving it at the dwelling house of the tenant has always been deemed sufficient. But he qualifies that by explaining that he speaks of notices affecting property, as notices to quit, and not those notices which are intended to bring an individual within personal contempt. Those may require personal service. The other, the ordinary civil notice (if I may so call it) is abundantly satisfied if it be left at the dwelling house of the party. In like manner Lord Chief Justice *Abbott* says:—"I have no doubt of the absolute sufficiency of the notice. So far as the landlord is concerned, the duty has been absolutely discharged." Well, then, there appears to have crept into the judgments given by some other Judges this suggestion—that the notice, when served at the dwelling house and received by the servant of the tenant, is *prima facie* evidence of a service on the master; and instead of its being *held, [574 in the language of Lord Chief Justice *Abbott*, that the service was absolutely sufficient, it has been supposed that the delivery of the notice to the servant may only be presumptive evidence of the delivery to the master. But inasmuch as the words speak-

ing of this presumption were loosely used (I think very improperly) the notion grew up that it was competent to meet that evidence by counter testimony, and to prove that the notice never reached the master. As a consequence you would control the landlord's right by evidence of something that the landlord was an utter stranger to, with which he had nothing whatever to do, and of which it would be impossible for him to know anything.

Now I quite agree with some of the language of Mr. Baron *Purke* in that case, in which he says that the servant is not an agent to receive a bill of costs. No, certainly not; if you have to deliver a bill of costs to a party to bring him within the summary remedy given by the statute, the service of a bill of costs on that servant would not be good. But that is a personal matter, which is wholly different, in the nature of things (as Lord *Kenyon* and Chief Justice *Abbott* point out) from a notice to quit served on the demised premises, being left at the house, which is part of the demised premises, where the tenant is actually residing at the time.

I shall be glad, therefore, if we can relieve the law from a degree of uncertainty and doubt brought into it, contrary to all principle, and if we can, in justice to the landlord, relieve him from having an act done by him, which act satisfies the obligation of the law, nullified and rendered of no effect by circumstances which have happened altogether after the delivery of his notice, and in the house of the tenant or under the control of the tenant, with which the landlord has no concern whatever.

Well, now my Lords, let me take it up on the lower ground, namely, that the service of the notice in the dwelling-house, by delivery to the servant of the tenant residing there, is *prima facie* evidence of service. Well, then, it is *prima facie* evidence which will remain good and valid until it is overborne by counter-evidence on the other side. Now what is it that that counter-evidence must be directed to? It is, accordingly to the lower view of which I am speaking, evidence from which you may presume that notice of the thing done reached the tenant. The [575] counter evidence must *therefore be proof that it did not come to the tenant's knowledge at all. Now let us see whether that is an inference of fact which can at all be drawn from the circumstances given in evidence by this defendant to overrule and repel the *prima facie* conclusion of the law in this case. What does the tenant say? His servant, the agent who received the notice, is called to prove that she put the notice on the dresser of the room when she received it, that it remained there several hours — two or three hours — and that whilst it was there one of her brothers came in and read it, and that on

his reading it the fact that it was a notice to quit became known to the members of the family. Now the members of the family appear to have been only three — this young woman herself, the brother who read the notice, and the other brother who acted with him in the management of their father's property. Their position is very forcibly described by the witnesses themselves, who say that the two brothers were in reality one master.

Now from this fact of the notoriety of the notice in the house, ought we not undoubtedly to draw the inference that the master of the house became aware and received information of that which all those about him knew, and which they would be naturally anxious, as, indeed, it was their duty to do, to communicate to the master of the house? It is impossible to derive from these circumstances the conclusion that the presumption of the notice having come to the knowledge of the tenant is rebutted. How can you infer that it did not come to the knowledge of the tenant when all those around him, those who acted for him and managed his affairs, became aware of the fact that the notice had been delivered at the house?

It is not a question as to the position in which the sons stand to the father. It is not necessary for the plaintiff to show that the sons were the recognized agents of the father. That would put it in quite a different light; because, then, if the notice came to the hands of the agent it came to the hands of the principal. But what we are considering is this — if the service of the notice at the dwelling house be in law only *prima facie* evidence of delivery to the master, then it is necessary for the person who is concerned to prove the insufficiency of that notice, to prove that in fact the notice did not come to the knowledge of the tenant. Well, then, *the course adopted here is to bring [576 forward circumstances which, if they prove anything, prove this, that there are grounds from which every man of common sense would infer that the tenant, the master himself, became aware of that which was notorious in his house, and which was known to the whole of his family and the persons about him who were concerned in the management of his affairs.

Then, my lords, comes the only difficulty — as to the course that was pursued at the trial. In reality I think there was no obligation on the learned judge to leave the question to the jury as he is represented to have done. I think it is plain that, on the facts, no question arose for the jury to determine. And when it was left to the jury, and when the jury returned a verdict that the matter was not known to the father, or that it did not personally reach the father, nor was the notice personally given to him, I think it is abundantly clear on the facts, as they are stated in evidence that that was a conclusion so utterly un-

warranted by the facts of the defendant's own case, that it was in point of fact a thing which ought not to have stood in the way of judgment being entered for the plaintiff.

On all these grounds, my lords, although I think the matter is left, by certain expressions used in former decisions, in a state of some embarrassment, from which I hope the judgment of your Lordships may tend to relieve cases of this kind in future, I am clearly of opinion that the notice was well served, that the *prima facie* conclusion of law was not met or repelled in any way, and that it is absolutely essential to hold, under the facts proved, that in law the tenant had knowledge of the subject of the notice. And that, therefore, if it were open to contradiction, on the ground that it might be proved that the tenant had not knowledge of the notice, that proof has not been given, but the contrary conclusion has been in fact established. The appeal must be dismissed, and of course it must be dismissed with costs.

LORD COLONSAY :

My lords, I am also of opinion that this notice was validly served. It is held in law that notice given to the servant of the party residing in the house is a service of notice on the master ; 577] *and I think that rule or presumption of law is peculiarly strong in a case where the circumstances are such as are disclosed here. And as the notice here was given to the servant, who happened also to be the daughter of the party, especially seeing the condition in point of health in which the father was, I think the notice must be held, if there was nothing to rebut that condition of things, to have been well served.

Well, then, an attempt is made to rebut that and to make out that the person to whom this notice was given was not an agent, not a person who is held in law to be a proper recipient of a notice of that description. Now, I do not think the evidence brought forward was sufficient to rebut the presumption, even if the question was in a condition in which it could be rebutted. The evidence only went to this : these persons said that they did not communicate directly with the tenant himself about the notice. I do not think that will do. There is no statement of any circumstances sufficient to rebut the legal inference that the person to whom the notice was given, standing to the party in the relation of servant, was not a legal agent to receive that notice. If we look to what is said in the evidence for the defendant, it confirms that position. For it appears that the tenant himself was in a weak condition, and that the daughter and the sons took care of him and managed for him — in short, that he committed himself to them — and, therefore, if

you look to that evidence it is rather evidence in confirmation of the legal presumption than against it. On these grounds I think the Judge did perfectly right in holding that the notice was sufficient.

I have farther to observe in regard to the course of this case that it would be endless if every particular circumstance were to be made the subject of a particular finding by the jury. Both parties seem to have raised before the jury this broad question: One party said that the notice was rightly served, and that the Judge ought to direct to that effect. The other party said that the notice was not rightly served, and that the Judge ought so to direct. These were the broad questions which the Judge was asked to deal with — and the Judge dealt with them by telling the jury that the notice was rightly served. I think, on the grounds I have already stated, that he could not have done otherwise. I *think there are no grounds in [578 law on which this notice can be considered as not rightly served. And I am, therefore, of opinion that the appeal must be dismissed with costs.

Order of the Court of Exchequer Chamber in Ireland affirmed, and appeal dismissed with costs.

Lords' Journal, 29th April, 1872.

Agents for the Plaintiff in Error: *Simson & Wakeford, for T R. Lynch, Dublin.*

Agents for the Defendant in Error: *Martin & Leslie, for E. J Smith, Dublin.*

April 25, 1872.

*MR. AND MRS. SMITH CUNINGHAME *et al.* Appellants, [223
MRS. ANSTRUTHER *et al.* Respondents.
et è contra.

[2 Scotch Appeals, 223.]

A Father's Power of Appointment under his Marriage Settlement.

Where a father was, by his marriage settlement, empowered to give at discretion the funds in which the children had an expectant interest:

Held, that he could not deal or negotiate with them in executing the power.

Per THE LORD CHANCELLOR: A parent in such a case purchasing the interests of the children, one of them being only eighteen years of age, is a transaction wholly inconsistent with that protection which the law of every civilized country affords to children; and would not be permitted without the fullest evidence of an intention authorizing it.

Held, reversing the decree below, that releases or discharges granted by the children to the father, in consideration of money payments made by him, formed no bar to their subsequent claims under the settlement, — such releases or discharges notwithstanding.

A Power may be executed without any Express Reference to it.

Per LORD CHELMSFORD: The donee of a power may execute it without referring to it, and without taking the slightest notice of it, provided the intention to execute the power really appears.

Appointments pro tanto.

The power may be exercised from time to time by several appointments, to suit convenience and promote advantage, as exigencies arise, or as expediency may suggest.

Per LORD WESTBURY: Some of the learned judges of the Court below seem to have thought that the power required an execution *uno flatu*, once for all. If that were so, no appointment to a child, though settled in life, could take place until all the other children, objects of the power, had attained maturity.

Special Judgment.

Per LORD WESTBURY: I am desirous that we should dispose of this case, so as not to leave any door ajar that may be pushed open for further litigation (*).

By ante-nuptial contract of marriage, dated the 26th of March, 1828, between *James Anstruther*, W.S., and Miss *Marian Anstruther*, daughter of Sir *John Anstruther*, of *Anstruther*, Bart., £4000, contributed by the intended husband, and all the property then 224] *belonging to the intended wife or which she might acquire during the marriage, were settled upon them "in conjunct fee and life rent, and on the children of the marriage in fee," the deed declaring that, in the event of there being two or more children, the father, or the mother if she survived him, should have power to divide and apportion among them the £4000; while with respect to the wife's property a similar power of distribution was conferred on the parents jointly or the survivor of them; and it was provided that, failing such division, the children should take share and share alike in full satisfaction of *legitim* (*).

At the date of the marriage Miss *Anstruther* had £8000, and she afterwards unexpectedly succeeded to upwards of £50,000 on the death of her nephew, Sir *John Anstruther*, Bart. The clause as to her property specially declared that "it should be in the power of the spouses jointly, and the survivor of them, at any time of their lives, or even on death bed, to divide and proportion the same among the said children as they should think proper."

There were three children, all daughters, the sole issue of this marriage, namely, Mrs. *Smith Cuninghame*, Mrs. *Mercer*, and Miss *Lucy Anstruther*.

Mrs. *Smith Cuninghame's* marriage took place in 1847, when she was but eighteen years of age; her father and mother (Mr. and Mrs. *Anstruther*) being parties to the ante-nuptial contract, and paying £5000 upon trust for the benefit of Mr. and Mrs. *Smith Cuninghame* and their children; there being a declaration in the deed that Mrs. *Smith Cuninghame* accepted the £5000 not only in satisfaction of *legitim*, but also in satisfaction of all claims that might be open to her under her parents' marriage settlement of 1828.

In 1859 Mrs. *Anstruther* died, survived by her husband. In 1861, their second daughter, Mrs. *Mercer*, married Mr. *Mercer*;

(*) See the elaborate judgment of the house, *infra*, p. 242.

(*) See Lord *Chelmsford's* opinion *infra*, where the clauses are fully set out.

and on that occasion Mr. *Anstruther* paid the trustees £5000; the marriage contract containing a declaration by Mrs. *Mercer* similar to that of her sister (Mrs. *Smith Cuninghame*), that the said sum £5000 was accepted by her in satisfaction not only of *legitim*, but also of all claims under the marriage settlement of 1828.

Having thus seen his two elder daughters disposed of in matrimony *Mr. *Anstruther* selected to be his own second wife [225 Miss *Anderson*, whom he married on the 11th of October, 1866, having previously, on the 8th of that month, executed a trust disposition and settlement, the first purpose of which was, "to pay over or invest £20,000 for the sole use and benefit of his youngest daughter *Lucy*; declaring that the amount should be in full satisfaction of *legitim*, and of all claims under the settlement of 1828. This deed was signed by Miss *Lucy* in token of her acquiescence. The second purpose of the deed was expressed by a direction to the trustees, "to hold and invest £30,000" for the benefit of Mr. *Anstruther's* second wife, to pay her the interest thereof for her life if she should survive him, and after her death for the benefit of the children "to be procreated of the intended marriage," whom failing, to the husband's own nearest heirs and assignees.

Seven months after his second marriage Mr. *Anstruther* died, survived by his second wife. There has been no issue of their marriage.

On the 31st of December, 1868, Mr. and Mrs. *Smith Cuninghame* commenced the action out of which the present appeal arose against the widow, Mrs. *Anstruther*, and against Miss *Lucy Anstruther*, and also against the deceased Mr. *Anstruther's* trustees, requiring them to separate his funds from those of his first wife; calling also for a declarator that there had been no proper apportionment of the mother's estate or of the £4000; and insisting that the pursuers were entitled to one-third of the provisions contained in the marriage settlement of 1828, giving credit for the £5000 already received.

It was decided by the Court of Session, first division (*diss.* Lords *Neaves*, *Archmillan*, and *Kinloch*), that all claim on the part of Mr. and Mrs. *Smith Cuninghame* under the marriage settlement of 1828 was excluded by the discharge or release contained in their own marriage settlement of 1847. The Court below, therefore, on the 11th of July, 1870 ⁽¹⁾, assolizied the defenders from the conclusions of the summons, and found the pursuers liable in costs ⁽²⁾.

⁽¹⁾ This judgment is represented in the 3d series, vol. viii, p. 10 49 as having been pronounced on the 10th of July, 1870.

⁽²⁾ See a full report of the case, 3d series, vol. viii, p. 1013; see also 3d series, vol. vii, p. 689.

1872

Cuninghame v. Anstruther.

226] *Mrs. *Mercer* with her husband sued for a third share of the funds provided by the settlement of 1828, giving credit for the £5000 already received.

On the 6th of March, 1871, the Court of Session decided against her as to the £4000 which came from her father; but decided in her favor as to the funds which came from her mother; the Court holding that Mrs. *Mercer's* case differed from that of Mrs. *Smith Cuninghame*, inasmuch as at the date of Mrs. *Mercer's* marriage the property had become vested in herself and her sister Miss *Lucy* (!). This was ruled by seven Judges, Lord *Deas* dissenting.

Against this judgment of the 11th of July, 1870, Mr. and Mrs. *Smith Cuninghame* appealed to the house, having for their counsel the *Solicitor-General* (2), and the *Dean of Faculty* (3).

Mrs. *Anstruther* and Miss *Lucy* put in their answer and also their cross appeal, being represented at the bar by the *Lord Advocate* (4) and Sir *Roundell Palmer*, Q.C.

The following opinions were delivered by the Law Peers:
THE LORD CHANCELLOR (5):

My Lords, the question in this case is as to the legal effect to be given to the original marriage settlement of 1828,—to the two settlements executed on the marriages of Mrs. *Cuninghame* and Mrs. *Mercer* respectively,—and to the £20,000 made over to Miss *Lucy Anstruther*, for which she gave her discharge. The ultimate conclusion come to in Mrs. *Cuninghame's* case by the majority of the learned Judges below was, that the £5000 provided in her settlement, coupled with the release or discharge which she gave, operated as a complete extinguishment of her rights under the marriage settlement of 1828, and, therefore, of course, the consequence was an absolute failure of her action.

In *Scotland*, as here, when there is a power of apportionment of
227] *this description existing in the parent he need not exercise it over the whole fund at one time; he may apportion it at intervals as the exigencies of his family require. The very object of such a power is to provide for such exigencies as they occur.

One argument which was pressed upon us for different construction was, that the interest being a *spes successionis*, contingent during the lifetime of both the father and the mother, it might have failed in both of the funds had Mrs. *Cuninghame* pre-

(1) 3d series, vol. ix, p. 618.

(2) Sir *George Jessel*, Q.C.

(3) Mr. *Gordon*, Q.C. The Dean of Faculty doubted whether he ought not to lead the English *Solicitor-General* as he does the Scotch. But Lord *Westbury* cleared the difficulty by mentioning that when his Lordship held the office

of English *Solicitor-General*, it was determined that he should precede the Dean of Faculty. As to other similar cases, see *Macqueen's* Treatise on the House of Lords, p. 337.

(4) Mr. *Young*, Q.C.

(5) Lord *Hatherley*.

deceased the distribution and the period of her acquiring a complete and absolute interest in it; and therefore it was contended that the payment of the £5000 on the part of the father might be regarded (as some of the learned Judges, who were, in fact, the majority decided) as a purchase by the father of the absolute right to all the interest of the child in the fund, and not as an apportionment of the fund itself. Now it appears to me that there are two reasons very strongly weighing against such a conclusion. In the first place the very notion of a parent bargaining with his child, in the language used by the learned Judges in *Scotland* entering into a transaction with his child for the purpose of purchasing her share in this species of expectancy, would be inconsistent with the law which has prevailed, I apprehend, in every country as to the protection of a child's interest — such a protection as makes it very difficult indeed for a parent under any circumstances to deal with a child; and certainly does not render it possible for him to do so without the child being fully informed of all the rights vested in such child. Therefore one would hesitate at any time to give to an instrument the construction of a bargain on the part of the parent in respect of an expectant interest on the part of his child.

Now here the child was not of full age. She was only eighteen and she had to look to the parent, and to that parent only, for protection. Some of the learned Judges say that the intended spouse might have afforded her sufficient protection. They seem to think that that actually was the case, and that she was so protected. But, I think, according to any system of law that can be administered in any civilized country, it could not be permitted that a parent, without the fullest evidence of such being the intention, and the circumstances of the case warranting the intention and *warranting the trans- [228] action, should become the purchaser of an unascertained interest in the child, an interest which could never be ascertained if the child died in the mother's lifetime, for a sum of money paid down, when the child's necessities required it, at the period of her marriage.

But I think there is abundant evidence to show that the parties did not intend anything of the kind. In the first place the father and mother joined. If it was an interest to be acquired by the father, why did the mother join at all? In the next place, there is no previous recital of the settlement until we come to the discharge, and when we come to the discharge, we find it to be an express discharge of all rights, and "all claims whatsoever, by or through the death of her said father or mother, or by the contract of marriage entered into between her said father and mother, and as the share or division hereby

allotted to her of her said father and mother's property settled by the said contract.

Now it seems to me that there is quite plain and sufficient reference to the instrument and to the object and intent of the parties in the very form there used, and though it is quite true that it goes on to give a general release of her father's property under any circumstances whatever, yet even that is not inconsistent with the original settlement, because in the original settlement whatever portions the children were to take under the settlement of 1828, are there expressed to be in discharge of whatever share they might be entitled to of the parent's property, either by way of *legitim*, portion natural, or otherwise. So that it is only repeating the effect intended to be given to the original settlement and to the taking under that settlement.

The argument was, that it operated as an appointment to her of the £5000, and a discharge by her of all further interest in the existing fund, and that thereupon there was an actual handing over of the residue of the fund to the other two children.

I do not think that the instrument bears at all that construction, and it is a construction which one would not place upon it unless some very clear words to that effect occurred. For observe what might happen, and what, in fact, really did happen. On the next daughter marrying Mr. Anstruther does the same thing; he gives £5000 in the same form, and with the 229] same discharge, and *there is very little doubt that if *Lucy* had married the form would have been exactly the same in her case, or at least it might have been so, so that he might have made three appointments of £5000 each. And having thus provided £15,000 out of the £60,000. he might have said the fund will now go back to the parties who provided it; so that the provisions originally contemplated would never have taken effect. But that would be an entire contradiction of the whole scope and frame of the original settlement, which was that the children were to take the whole, except where it was disposed of for onerous consideration.

It appears to me that this dealing with this sum of £5000 could only take effect as an apportionment *pro tanto* of the fund, leaving the rest of the fund to be apportioned. It was said even by those who opposed Mrs. *Cunninghame's* claim that they could not put their argument so high as to say that the parent had no right to increase her portion if he thought fit.

It was conceded, as regarded the father, that however he might be himself protected by the discharge he was not himself prevented from making a further apportionment if he thought fit.

When we come to Mrs. *Mercer's* case the sole difference is this: The mother having died, that interest which had been

previously a *spes successionis* became absolute in Mrs. Mercer as regards the mother's property, subject only to the life-rent of the father.

The learned Judges were unanimous, I think, upon this case of Mrs. Mercer in setting aside the discharge in Mrs. Mercer's settlement.

LORD CHELMSFORD : Lord Deas differed ⁽¹⁾.

THE LORD CHANCELLOR : But the other Judges, I think, all concurred, because they said that in Mrs. Mercer's case the discharge was made in ignorance of her position, that there was ignorance of the true state of the case as regarded her, namely that she would be placed in a much more favorable position than that of Mrs. Cunningham by the circumstance of her mother's death and her having acquired a positive interest in this fund with which she was parting to so large an extent.

*I apprehend that what has happened is this : An ap- [230] portionment was made, first of £5000, part of the fund, to Mrs. Cunningham, and her discharge has not prevented her having any other part that may be unapportioned. And Mrs. Mercer is placed in the same position. So that the two sums of £5000 having been taken out of the fund, it now remains to be seen what is to be done with the rest of it.

Then there is the dealing with Lucy, which is subject to the same remarks, namely, that there is an express recital that it is intended to operate by way of apportionment of the fund, and there is a discharge by Lucy, as in the other deeds. Therefore, it appears to me that the proper conclusion to come to is, that the £20,000 made over to her must be taken as an apportionment of the fund *pro tanto*. So that the sum of £30,000 out of the whole fund has been apportioned. It is said that the £30,000 exhausts the whole fund. We have every reason to suppose that it does not ; but that must be a subject of inquiry, and the surplus, when ascertained, will have to be divided among these three ladies in equal proportions. I think that that in substance really reaches the whole of the case we have before us. It may be reduced to these simple propositions :—the first being that the children, in the event of the fund not being alienated for onerous cause already, had the right which has now accrued in the two funds, that of the father and that of the mother ; secondly, the sum paid over to the first child, and accepted by her as her allotted portion, does not operate to bar and sweep her out of the whole benefit to be derived from the settlement, but only operates *pro tanto* as far as the £5000 goes ; and, thirdly, the sum allotted to Mrs. Mercer in effect amounts to a similar appointment of the £5000 apportioned to her. And therefore

(1) 3d series, vol. viii, p. 1028.

your Lordships will have to make a declaration that the settlements of Mrs. *Cunninghame* and Mrs. *Mercer* are respectively appointments or apportionments under the power contained in the settlement of 1828. But the alleged release contained in each of those settlements does not amount to or effect any bar to the right of participation in any portion of the property, subject to the power of apportionment which may not be apportioned under that power. And that the release given by the third child in the same way does not operate as barring her from 231] *taking any share in the remaining fund, and that the gift made by the trust settlement of 1856 of £20,000 to the third daughter *Lucy* is also an appointment to *Lucy* under the power, which it was fully competent to the donee to make, and then to order that if the two sums of £5000 and £20,000 do not in the aggregate amount to the whole of the funds brought into the two settlements, the balance of those funds is unappointed property, and is distributable under the trusts of the settlement of 1828 among the three children in equal shares; and that there must be an inquiry in order to ascertain of what those funds consist.

I ought to add that the Lord Chancellor of Ireland (¹), who was present at the hearing of this case, concurs in the opinion which I have expressed, that the sums advanced to Mrs. *Cunninghame* and Mrs. *Mercer* were in effect appointments, and that they were not debarred from sharing in the fund which might remain unappointed and unappropriated. I am not, of course, able to say that he has known absolutely all that I have now stated, but he assents to my conclusions.

LORD CHELMSFORD :

My Lords, the questions upon this appeal may be conveniently considered under the following heads :

(1). What is the nature of the right or interest which the children of Mr. and Mrs. *Anstruther* took under their parent's marriage contract ?

(2). Was the power of apportionment amongst their children contained in that marriage contract duly exercised by the obligation which the parents jointly took upon themselves in Mrs. *Cunninghame's* marriage contract, and Mr. *Anstruther* alone in Mrs. *Mercer's* marriage contract, to pay £5000 to trustees in trust for them and their children respectively, and by the acceptance by each of them of that sum in satisfaction of all claims which they had under the marriage contract of their parents ?

(3). Is there any ground for the reduction of the clause of discharge in Mrs. *Cunninghame's* and Mrs. *Mercer's* marriage contract, or either of them ?

(4). Assuming that the sums of £5000 paid to trustees for

(¹) Lord O'Hagan.

Mrs. **Cuninghame* and Mrs. *Mercer* on their respective [232 marriages were proper exercises of the power of apportionment, and that the £20,000 given to *Lucy Anstruther* by her father upon his second marriage was also a good apportionment of that sum to her, and that these several sums did not exhaust the fund over which the power existed, how is the unappropriated fund remaining after the apportionments to be dealt with?

The nature of the right and interest of the children under the marriage contract with Mr. and Mrs. *Anstruther* seems to me to admit of little dispute. In each case of the property brought into settlement the fee was in the party from whom it proceeded, subject respectively to a liferent in the other surviving; and the children had a succession which has been indifferently called a *spes successionis* and a protected interest; but whatever its proper name, it was a contingent right, which could have been defeated by a disposition for onerous causes, but not by a gratuitous alienation.

Upon the death of both their parents the children would have been entitled equally to the whole of the property, whether derived from their father or their mother, unless the power of apportionment amongst them contained in the marriage contract were duly exercised. That power as to the father's £4000, is reserved to him to divide and proportion as he should think proper in favor of the children, and the mother surviving him was to have the same power; and as to the property provided by the mother, the power to divide and proportion it among the children was given to the parents during their joint lives, and afterwards to the survivor; and in both cases, failing any division, the provisions were to be divided among the children equally, share and share alike.

The next question, therefore, to be considered is, whether this power of apportionment amongst the children was duly exercised by the obligation to pay £5000 to trustees under Mrs. *Cuninghame's* and Mrs. *Mercer's* marriage contracts respectively, and their acceptance of those sums in satisfaction of all their claims under the marriage contract of their parents. There is no difference in the cases of these two children, except that at the time of Mrs. *Mercer's* marriage her mother was dead, and the obligation to pay the £5000 was undertaken by the father surviving. The clause of *discharge of their claims [233 is in the same terms, *mutuis mutandis*, in the marriage contracts of each of the daughters.

Taking Mrs. *Cuninghame's* as the example, it runs thus :

And which said sum of £5000 is hereby declared to be, and the said *Maria Anstruther* hereby accepts of the same in full satisfaction of all *legitim*, portion-natural, or bairns' part of gear, and of all claims whatsoever which she (the said *Maria Anstruther*) has in any manner of way by or through the death of her

said father or mother, or by the contract of marriage entered into between her said father and mother, dated 24th and 26th days of March, 1828, and as the share or division hereby allotted to her of her said father and mother's property settled by said contract, all which claims are hereby settled accordingly.

It was argued on the part of the appellants that this could not have been intended as an execution of the power of apportionment, because there was no reference to the power, and because of the release, not only of the daughter's claim under the marriage contract of her parents, but also of her *legitim*, portion-natural, and bairns' part of gear; but that it was a transaction between the father and daughter, by which he, paying the £5000, not out of the trust funds, but from his own moneys, purchased the release of his daughter's claims for his own benefit; and that this opened to the appellants the grounds of reduction of the clause of discharge upon which they insisted.

It appears to me that the obligation to pay the £5000 was intended to be, and was understood by all parties to be, an execution of the power of apportionment. Little reliance can be placed upon the circumstance that the clause contains no express reference to the power. As Lord *St. Leonards* says in his book on Powers ⁽¹⁾, a donee of a power may execute it without referring to it, or taking the slightest notice of it, provided that the intention to execute it appears. And the reason of this is given in *Scrope's Case* ⁽²⁾, to which he refers, "*quia non refert an quis intentionem suam declaret verbis, an rebus ipsis, vel factis.*"

It appears clearly that the power must have been in the contemplation of the parties, from the words of acceptance of the £5000 by Mrs. *Cunninghame* in satisfaction (*inter alia*) of the share or division thereby allotted to her of her said father and mother's property settled by the marriage contract. It seems difficult to [234] put any other construction upon these words than *that of an acknowledgement that the £5000 was the share or division which Mr. and Mrs. *Anstruther* had the power to allot by their marriage contract. The acceptance of this sum, not only as the allotted share, but also in satisfaction of the *legitim*, portion-natural, or bairns' part of gear, which is used as an argument against its being an exercise of the power, strengthens my opinion that it must have been so intended. For the creation or reservation of the power in Mr. and Mrs. *Anstruther's* marriage contract is immediately followed by the words :

which provisions conceived in favor of the child or children of the said marriage shall be in full satisfaction to them of all bairns' part of gear, *legitim*, portion-natural, executry, and everything else that they should ask or claim by and through the decease of the said *James Anstruther*, their father, except what he may think fit to bestow of his own good will only.

The satisfaction of these rights and interests would have fol-

(1) 8th ed., p. 289.

(2) 10 Co. Rep., 511.

lowed upon the due execution of the power; and therefore it was unnecessary that it should have been expressly mentioned; but having been so, it shows that the clause must have been framed with direct reference to the power, and it leaves no doubt in my mind that it was intended to be an exercise of it.

An objection was made to the execution of the power, that the appointment of the £5000 to the daughters respectively was not confined to them, but made to others who were not objects of the power. This is answered by the case of *White v. St. Barbe* (¹), in which it was decided that under a power to appoint among children interests may be given to grandchildren by way of settlement, with the concurrence of their mother (an object of the power) and her husband.

Having shown that the £5000 given to the daughters upon their respective marriages was in exercise of the power of apportionment, and not a transaction with their parents, the next proposed question as to the reduction of the clauses of discharge in their marriage contracts, and all the evidence given as to their ignorance of their rights at the time of their acceptance of the £5,000 in satisfaction of their claims, falls to the ground. Because if a parent has a power of appointing a fund amongst children in such proportions as he may think proper, he may exercise that power at his own will and pleasure; and [235 whether the child who has a share allotted is a minor or of full age, or whether he knows or is ignorant of the extent to which he might eventually become entitled in succession, or whether he expressly accepts or not the provision which is made for him, is wholly immaterial, as he can by no possibility control the parent in his discretion to distribute the fund amongst the children as he thinks proper.

Mrs. *Mercer's* case differs in no respect in the character of the provision made for her upon her marriage from that of Mrs. *Cunninghame*. Both were in exercise of the power of apportionment or neither. Mrs. *Mercer's* release of her claims could only be reduced upon the ground of its being a transaction with her father in ignorance of her rights in the succession to her mother's property; and if it were of that character, the clause in Mrs. *Cunninghame's* marriage contract is precisely similar. I cannot understand if, in Mrs. *Mercer's* case, it was a transaction which ought to be reduced, why the same conclusion was not adopted in favor of Mrs. *Cunninghame*. The Lord President draws this distinction between the two cases: When Mrs. *Smith Cunningham* was married in 1847" (he says) "she had nothing but a contingent claim against either her father or mother under their marriage contract, and she was receiving a present considera-

(¹) 1 V. & B., 339.

tion in money for a discharge of that contingent claim. But when Mrs. Mercer was married in 1861 she had much more than a contingent claim; she had a joint fee along with her sister Lucy in the whole estate of which her father was life-renter." But with great respect the question in the case of both the daughters was not as to the nature of their rights, but as to their knowledge or ignorance of them; and in this view it seems to be immaterial whether the interests with which they were respectively dealing were contingent or vested. If they are to be considered as transactions which may be reduced on the ground of ignorance of facts which disabled the daughters from exercising a right judgment whether they should accept the £5000 in satisfaction of their respective claims, the case of Mrs. Cuninghame seems to be stronger in favor of reduction than that of Mrs. Mercer, as she was a minor, and her natural guardian, her father, does not appear to have afforded her the protection which 236] she was entitled to expect from him. I could not avoid making these remarks upon the interlocutors of the Court of Session reducing the clause of discharge in Mrs. Mercer's marriage contract, and refusing to do so with respect to a similar clause in the marriage contract of Mrs. Cuninghame, although, as I have already shown, these clauses being in both cases introduced into the contracts in the exercise of the power of apportionment contained in Mr. and Mrs. Anstruther's marriage contract, reduction of them is out of the question.

There only remains to consider what is to be done with the trust fund which, after all the allotments made in exercise of the powers of apportionment, is left unappropriated. I do not think that by these allotments the parents put it out of their power to increase the provision made for the daughters; nor was the joint power in Mr. and Mrs. Anstruther so exhausted by their exercise of it in Mrs. Cuninghame's favor, as to render it incompetent to Mr. Anstruther surviving, to make an addition to what had been before given to her.

Out of the unappropriated residue of the fund a sum of £20,000 was given to trustees by Mr. Anstruther for his daughter Lucy upon the occasion of his second marriage. There was a doubt suggested in argument whether this ought to be regarded as an appointment of the fund over which the power existed, or was not rather a bargain with Lucy out of Mr. Anstruther's own property. He certainly entertained the idea that after the death of his first wife he had the absolute fee in her property. And the trust disposition and settlement upon his second marriage with Miss Anderson proceeds upon this supposition. He thereby assigns, disposes, conveys, and makes over to trustees his whole means and estate, heritable and moveable, real and personal,

in trust after payment of his just and lawful debts, death bed and funeral charges, and the expenses of carrying the trust into execution, to pay over or invest the sum of £20,000 for the sole use and behoof of *Lucy Anstruther* and her heirs and assignees. And his trustees are to hold and invest the sum of £30,000 for payment to his promised spouse of the interest during her lifetime, and after her death the principal to the children of the marriage. The whole of the settlement has more the appearance of a disposition of his own property than of the exercise of a power by *which his authority was limited. But as in [237 the allotment of the shares of the two other daughters the provision for *Lucy* is declared to be in full satisfaction of all claims she may have for bairn's part of gear, *legitim*, portion-natural, or through the marriage contract between her father and mother, and *Lucy* in token of accepting the provisions in full of all such claims subscribes the settlement, I think that if it had been to *Lucy's* interest to reject this provision as not being an exercise of the power of apportionment in her favor, it would not have been competent to her to do so; nor can her sisters successfully contend that there has been no due exercise of the power to the extent of this £20,000. But the £30,000 given to the second wife could only be a valid disposition if *Mr. Anstruther* were fiar of the fund remaining unapportioned amongst the children of his first marriage, because it would then be, as the Lord Ordinary said, "subject to his disposal for onerous causes or just and rational consideration." But he having only a power to divide and proportion the fund amongst the children of the first marriage, the disposition to the second wife was clearly void, as she was not an object of the power. The result is, that the whole remaining fund, beyond the two sums of £5000 to *Mrs. Cunningham* and *Mrs. Mercer*, and the £20,000, to *Lucy Anstruther*, comes to be distributed equally amongst the three sisters, share and share alike, according to the provisions of the marriage contract of *Mr. and Mrs. Anstruther*.

I agree with my noble and learned friend in the judgment which he has proposed to your Lordships.

LORD WESTBURY:

My Lords, it is a matter of regret to observe the uncertainty and variety of opinions upon what in *England* would be deemed a very simple case; where, however, our Courts would not proceed upon any grounds that are not common to the jurisprudence of *Scotland* in this matter.

I must advert to the notion that seems to have been entertained by some of the learned Judges of the Court below, that the language of this power required an execution *uno fidei*—

238] once for all ⁽¹⁾. *Some of them appear to have imagined that the language required an entire apportionment, and that it did not admit of appointments from time to time; which would be to put an interpretation on the words utterly at variance with the objects of the power, and utterly subversive of any useful application to be made of the power. No appointment could be made to a child settled in life or married, until all the other children had also become of such an age that their future destination could be ascertained and fixed. It is quite clear that the reason of the thing demands that the power given to the parents — in one instance to the father, in the other instance to both parents — to apportion at any time must be interpreted so as to warrant the appointment being made from time to time; and so, in truth, it appears to have been conceded at the bar, because it was admitted that after the appointment to Mrs. *Cuninghame* and to Mrs. *Mercer* further appointments might have been made.

The next difficulty felt by the learned judges in the Court below was on the words which have been denominated a “release” in the appointment to Mrs. *Cuninghame* and in the settlement for Mrs. *Mercer*, and various effects have been ascribed to these alleged words of release. Some learned Judges appear to have imagined that they operated as an assignment by contract to the father, or the donee of the power, of the whole extent of the portion which in an equal division of the entire fund might have been attributed to the objects of the power. Now, it is quite clear that that would destroy the very foundation upon which the powers given to the parents are rested. If it were possible to admit any contract between a father and a child as the reason for the exercise of the power, fraudulent transactions might be introduced, destructive of the interests of the child, and giving to the father that which he ought not to obtain. In accordance with the settled principles of equity, it is impossible to hold that the father could gain any benefit to himself in the residue of the trust fund by having made an appointment on one part of it as to one of the children.

But some of the Judges imagine that the release might enure to the benefit of the two other sisters who were the objects of the power. Sometimes it was imagined that the release of Mrs. 239] *Mercer*’s *settlement might enure to the remaining sister. It is utterly impossible to find in either settlement any contract to that effect, or that the words should receive that interpretation, even if it were possible that such a transaction should have force given to it consistently with an honest exercise of the power. The truth is, that what are called the words of release amount

(1) See the opinions, 3d Series, vol. viii, p. 1017.

to no more than this, — that the sum appointed to the child shall be taken as part of the settlement provision in which the child under the trust settlement had an interest. The whole case, therefore, assumes a very simple aspect as soon as the ordinary suggestions of common sense are applied to the interpretation and to the effect which, having regard to the intention of the power, ought to be attributed to it.

Now, the relative position of the children is perfectly clear. They stand on an equality with regard to the undistributed and unappointed parts of the fund. The father's right to determine the quantity is thereby acknowledged, so far as he has exercised that right. He thought proper to appoint £5000 to Mrs. *Cuninghame*, reserving, of course, the right of making a further apportionment. In like manner he has given £5000 to Mrs. *Mercer*, and in like manner he has given to Miss *Lucy* £20,000. But, supposing these sums not to exhaust the fund, the residue falls under the disposition contained in the settlement, and will be divisible equally among the three sisters.

I consider that the settlements on Mrs. *Cuninghame* and Mrs. *Mercer* are respectively appointments under the power contained in the settlement of 1828. I prefer the word "appointment" because the word "apportionment" seems to imply a dealing with the entirety of the fund. But the alleged release contained in each of the settlements does not amount to, or effect, any bar to the right of participation in any portion of the property, subject to the power of appointment, which may not have been appointed under the power. Neither does the release give to the third child, or operate by implication as an appointment to the third child, of the residue of the funds which were subject to or comprised within the power. The gift made by the trust settlement of 1866 (that is, Mr. *Anstruther's* will) of £20,000 to the third child, *Lucy*, is, in my opinion, an appointment to *Lucy* under the power, and which it *was fully competent to [240 the donee of the power to make. But if (as in this case) the two sums of £5000 and the £20,000 do not together equal the aggregate amount of the funds brought in by Mr. *Anstruther* under the settlement of 1828, and of the funds of Mrs. *Miriam Anstruther*, also brought into that settlement, the balance of these funds (after deducting the three sums amounting in all to £30,000) is unappointed property, and is distributable under the trusts of the settlement of 1828 among the three children in equal shares; for I do not think the children are bound in this division of the surplus to bring into hotchpot the sums appointed to them respectively. The right of the children to the provisions brought in by Mr. and Mrs. *Anstruther* under the settlement of 1828 was not defeated by the provisions for the

second Mrs. *Anstruther* under the settlement of 1866. On the death of Mrs. *Marian Anstruther*, her surviving husband became fiar in trust of all the property brought in by *Marian*, and could not defeat the interests of the children.

Therefore the interlocutor of the 11th of July, 1870, was totally wrong. The judgment in Mrs. *Mercer's* case is wholly inconsistent with it, inasmuch as it finds that Mrs. *Mercer* was entitled to share with her sister Mrs. *Cuninghame* in the estate and effects of their mother so far as not settled and appropriated by their father and mother jointly, or by their father after their mother's death. It will be observed that my observations would give the surplus to the three sisters. The difference of the decision in Mrs. *Cuninghame's* case from that in Mrs. *Mercer's* case cannot be supported by any difference in the wording of the alleged releases in the two settlements, for they are identical. And it is evident that the question as to the fee of the settlement funds is wholly immaterial, it being admitted that the power of apportionment remained unaffected, and that, *subject to that power*, the effect of the settlement of 1828 was to give the whole of the settlement estate to the three children as substitutes to their parents in equal shares.

There is no question with any creditor or alienee for value of Mr. *Anstruther*.

I think it expedient that the order of the house shall embrace both appeals. Subject to any alteration that may hereafter be deemed advisable, I will read what I should propose as the form 241] *of the judgment for the information of the counsel at the bar: [Here Lord *Westbury* gave the heads of the judgment which was afterwards adopted by the house.]

There is a point which I must submit to your Lordships' attention, and that is the question how the enormous amount of the costs which have been incurred in this unfortunate litigation are to be met. Now, considering how the decisions in this case have varied, the wanderings of the parties themselves may in some degree be excused, and I should, therefore, humbly submit to your Lordships that the costs of all parties should be paid out of the free estate of Mr. *Anstruther*.

I am desirous that if possible we should dispose of this matter in such a way as not to leave any door ajar that may be pushed open in the Court below so as to admit of further litigation. Whether we can do that or not may be very problematical. I understand that your Lordships wish to reserve to yourselves the power of considering the exact form of your order. I am not at all sure that the words I have now read comprehend the whole of the matter, but in case any alteration therein should be desirable, perhaps your Lordships will approve of the form of

account being given, before the order is made, to the counsel on either side, not to afford an opportunity for any further argument at the bar, but that they may be at liberty to send in such amendments in the form of account as they may think desirable.

THE LORD CHANCELLOR :

My Lords, with reference to the last remark that my noble and learned friend has made regarding the expense of this litigation, I should go so far with him as to think that ultimately Mr. *Anstruther's* property, he being really the cause of the mode in which these instruments were executed, and therefore the source of the vexation and intricacy that have subsequently occurred in solving the various questions which have arisen, might be charged with that expense; but one does not know how the course of events may turn out with reference to the proportion of property in the several estates. As between the three sisters I apprehend that all costs should come equally, if they are obliged to have recourse to their own funds, out of that free fund which is left after the *apportionment, but having recourse to the fa- [242 ther's estate, in the event of that estate being sufficient to answer them, in order to recoup the diminution of the fund. The father's estate therefore will pay the costs in the first instance if sufficient to do so. If not, the costs will necessarily have to come out of the fund to be divided.

LORD WESTBURY: I have not the least objection to that.

THE LORD CHANCELLOR: Then the question will be, that the interlocutors complained of, so far as they are inconsistent with the declaration afterwards to be contained in your Lordships' order, be reversed. We will postpone the exact form of the declaration, though I believe we agree in substance with the proposal of the noble and learned Lord. And as to the expenses, that they be borne in the manner prescribed in the form of order as it will be finally drawn up.

The final judgment of the house was as follows:

Ordered and adjudged, that the interlocutor of the 11th of July, 1870, be reversed; and that such parts of the interlocutors of the 18th of March, 1869, and of the 6th of March, 1871, as are inconsistent or at variance with the findings and declarations and order hereinafter expressed, be also reversed; and this house doth find and declare, that the marriage settlement of Mrs. *Cuninghame*, and the marriage settlement of Mrs. *Mercer*, were respectively valid appointments of the two sums of £5000 in exercise of the power contained in the settlement of 1828; but that such appointments did not exclude Mrs. *Cuninghame* or Mrs. *Mercer* from participating in so much of the funds or property comprised in the said deed of 1828 as have not been appointed under the powers therein contained. And this house doth further find and declare, that the trust disposition and settlement of Mr. *Anstruther* of the 8th of October, 1866, was a good appointment under the power in the said deed of 1828 to *Lucy Anstruther* of the sum of £20,000, but that she is not thereby debarred from participating equally with Mrs. *Cuninghame* and Mrs. *Mercer* in the residue of the settlement funds of 1828

(if any) remaining unappointed or unexhausted by the said three appointments. And this house doth further find and declare, that according to the true construction of the powers contained in the said settlement of 1828 the same admitted of being validly exercised from time to time by several appointments. And this house doth find and declare, that the estate of Mr. *Anstruther* is entitled to have credit in the account hereinafter directed for the two sums of £5000 paid by him to the trustees of Mrs. *Cuninghame's* and Mrs. *Mercer's* settlements and for any sum received by Miss *Lucy Anstruther* on account of the sum of £20,000. And this house doth further declare and direct, that a reference be 243] *made to such person as the Court of Session shall appoint under the remit hereby made to take the following accounts: 1. An account of all funds, moneys, and property that were comprised in or became subject to the trusts or dispositions expressed or made in and by the said settlement of 1828, and of the manner in which the funds, moneys, and property, at the death of the said *James Anstruther*, and to ascertain and state what, if anything, was at the time of his decease due from the said *James Anstruther* (subject as aforesaid) in respect of any trust property or principal trust moneys received by him and applied to his own use, and to ascertain and state the balance due from the estate of the said *James Anstruther* to the trust estate under the said settlement of 1828; and, if necessary, to take an account of all the estate of the said *James Anstruther* not comprised in or subject to the trusts of the said settlement of 1828 and of the receipts and payments of his trustees or representatives in respect of such estate (not subject as aforesaid), and to ascertain what estate of the said *James Anstruther* is applicable to the payment of the balance that may be found due from him to the trust estate under the said settlement of 1828 as aforesaid. And it is further ordered, that the expenses of all parties in the Court of Session, being taxed under the direction of the said Court, and the costs of all parties in respect of this appeal, the amount thereof being certified by the clerk of the parliament, be paid as follows, namely, the costs and expenses of the trustees of the said *James Anstruther* shall be paid out of the free estate of the said *James Anstruther*; and if any balance of the said free estate shall remain after such payment, the costs and expenses of the several other parties shall be paid out of the said balance, and if the same be deficient, then the last mentioned costs and expenses, or any balance thereof, shall be paid out of the residue of the said settlement funds remaining unappointed or unexhausted as aforesaid. And it is also further ordered, that the cause be remitted back to the Court of Session in Scotland, to do therein as shall be just, and consistent with these declarations, findings, and directions, and this judgment.

Agents for the Appellant: *Grahames & Wardlaw.*

Agents for the Respondent: *Loch & Maclaurin.*

The cases holding that it is an equitable fraud for a parent to deal with a child recently arrived at majority were collected by the editor in a note to *Sprague v. Ducl*, Clarke's Ch. Rep., 96 (second edition), and in a note to *Turner v. Collins*, 2 English Rep., 304; see also Dunlap's note to *Stratford v. Tynnam*, Jacobs' Chy. (Banks's ed.), 422; *Wright v. Verplank*, 8 De Gex MacNaghten and Gordon, 133, and Mr. Perkins's note to Am. ed.; *Keogh v. Barrington*, Drury's Cases Temp. Napier, 1; *Low v. Holmes*, id., 290; *Price v. Martin*, 46 Mississippi, 489; Matter of Will of Jackman, 26 Wisconsin, 104; *Woodward v. Libby*, 58 Maine, 42; *McCormick v. Sarsen*, 45 N. Y., 265; but see *Wells v. Selwood*, 61 Barb., 238. In cases where a person of feeble intellect is induced to

sell his property for an inadequate price the court on setting the transfer aside may allow it to stand as a security, by way of mortgage, for the money advanced, *Longmate v. Ledger*, 2 Giffard, 157, and see *Robinson v. Stewart*, 10 N. Y., 190.

Where a bank, with knowledge of the relative position of the parties, places the proceeds of a promissory note, which has been made in their favor by A (a person just come of age), unreservedly in the power of B (a person who stands in loco parentis to A) knowing at the time that B claims to be a creditor of A to a large amount of necessities supplied, and B afterwards misappropriates the money, the bank will be restrained from suing on the note *Deltman v. Metropolitan etc.*, 1 Hemming & Miller, 641.

July 19, 1872.

*COUSTON, THOMSON, & Co., WINE MERCHANTS IN [250
LEITH, Appellants;
CHAPMAN, AUCTIONEER IN EDINBURGH,¹ Respondent.
[2 Scotch and Divorce Appeals, 230.]

Sale by Sample — Privileges and Obligations of the Purchaser.

The purchaser of goods by sample ought to examine them without delay; and if he find that they are not conformable to the sample, he may reject them and rescind the contract — giving immediate notice that he does so, and that the goods are at the risk and disposal of the vendor.

Should the vendor not acquiesce, the purchaser should place the goods in neutral custody, duly apprising the vendor.

The purchaser is not entitled to hold by the contract and ask for other goods instead of those to which he objects.

Where in such a case certain purchasers had omitted to rescind the contract, and neither returned nor offered to return the goods, they were held liable for the price.

Per LORD CHELMSFORD: As I understand the law of *Scotland*, although the goods have been accepted by the purchaser, yet if he find that they do not correspond with the sample, he has an absolute right to return them. In *England*, if goods are sold by sample, and they are delivered, and accepted by the purchaser, he cannot return them; but if he has taken the delivery conditionally, he has a right to keep the goods for a sufficient time to enable him to give them a fair trial — and if they are found not to correspond with the sample, he is then entitled to return them.

Per LORD CHELMSFORD: In *England*, if a horse is sold with a warranty of soundness, and it turns out to be unsound, the purchaser cannot return the horse unless there is a stipulation that if the horse does not answer to the warranty the purchaser shall be at liberty to return it. But in *Scotland*, as I understand the law of that country, there would be an absolute right to return the horse upon the discovery of its unsoundness, without any specific stipulation to that effect.

On the 19th of March, 1870, several lots of wine were purchased by the appellants from the respondent at one of his public auctions at *Edinburgh*. The sale of each lot was by sample. The price of the whole was £699 16s. 5d. The delivery of the goods was completed by the 11th of April.

The appellants had the wine examined. The result was unsatisfactory, especially as to lots 24 and 51. On the 31st of May they wrote to the respondent, saying they “were agreeable to pay for the rest of the goods,” but intimating, as to lots 24 and 51, that they would pay for them when supplied according to the sample; adding that they “considered themselves entitled to the *difference between the price at which they had purchased [251 them and the price at which they could be bought in the market.” The respondent answered on the 1st of June that the appellants’ “proposition could not be entertained.” On the 3d of June the appellants wrote by their agent, saying “they were anxious to have the matter settled,” but doing nothing to attain that object. On the 8th of June the respondent’s agent replied

(¹) See *Heilbrutt v. Hickson*, *post*.

that they were preparing a summons for payment of the price "of the wine purchased on the 19th of March." On the 9th of June the appellants, by their agent, proposed a reference, but they still kept the wine and withheld the price. On the 13th of June the respondent's agent sent by letter the threatened summons, which was acknowledged on the 14th of June as "served;" the appellants' agent then writing that "his clients" (the appellants) "were agreeable to pay for the whole of their purchases, with the exception of lot 24 and 51, which they were willing to return without any claim for deterioration or value." This communication put an end to the negotiations, and the respondent's action against the appellants came before the Lord Ordinary ⁽¹⁾ who, on the 29th of November, 1870, decided as follows:

Finds (1) that the defenders purchased from the pursuer, at a public sale on the 19th of March, 1870, the various lots of wine mentioned in article first of the pursuer's condescendence, and that at the various prices therein specified: Finds (2) that shortly after the sale, and about the end of March or beginning of April, the defenders received delivery of the whole lots so purchased by them: Finds (3) that some time thereafter, and in April and May, 1870, the defenders objected to lots Nos. 24 and 51 as being disconform to sample: Finds (4) that the defenders did not expressly offer to return these lots, but the pursuer intimated that he would not receive them unless the whole lots purchased by the defenders were returned: Finds (5) that the defenders have not returned, and have not placed in neutral custody, any of the disputed lots, or any part thereof, but have retained, and still retain, in their own possession, custody and control, the whole lots purchased by them: Finds, in point of law, that the defenders are barred from now withholding payment of the price on the ground that the wines, or any of them, are of defective quality: Therefore decerns and ordains the defenders to make payment to the pursuer of the sum of £099 16s. 5d. sterling with interest thereon and expenses.

His Lordship explained in a note that the specialty on which the Lord Ordinary has felt himself compelled to decide the whole case against the defenders, is, that, notwithstanding the challenge and the dispute, the defenders *have, from the time of delivery until now (a period of eight months, and more than seven months after the alleged bad quality was discovered) retained the whole wine in their possession and under their own control, and have failed to place it either in neutral custody, or to apply timeously for a warrant of sale. It is quite fixed that a purchaser who rejects goods as disconform to order has no right to retain them as a security for damages, or that other goods shall be sent. If he does so, though his objection to quality be well founded, he must pay the contract price.

Against this interlocutor the appellants reclaimed to the first division, who, on the 10th of March, 1871, found and decreed as follows: ⁽²⁾

Find that no return or offer of return of the said wines, or any part of them, was made before the institution of the present action, and that the said wines have all along remained in the custody and under the control of the defenders, and that they have at various times, and at their own hand, opened and used, for the purpose of trial and experiment, portions of the wines of which the defenders

⁽¹⁾ Lord Gifford.

⁽²⁾ 3d series, vol. ix, p. 675. Lord Deas dissented from the judgment upon the facts; but he did not dispute the general principles of law laid down by the other Judges.

refuse to pay the price, to the extent in all of four or five dozen bottles: Find, in point of law, that, in these circumstances, the defenders are now barred from withholding payment of the price of lots 24 and 51, on the ground that these lots are disconform to sample, or not conformable to the contract of sale: Therefore decern against the defenders in terms of the conclusions of the summons.

Under these circumstances the present appeal was presented to the house, and having been set down for argument,

Mr. *Manisty*, Q.C., and Mr. *Campbell Smith* appeared for the appellants, and were very fully heard.

The *Lord Advocate* (*) and the *Solicitor-General* (†) were not called upon to address the house; their Lordships delivering the following opinions:

THE LORD CHANCELLOR (‡):

My Lords, it is clear in this case that the purchase of each lot was a distinct contract. The question is as to lots 24 and 51, and the contest of the appellants is, that the sale having been by sample, these lots were not conformable to the sample. The sale took place on the 19th of March, and the delivery was to have been immediate, but did not take place until early in April. Sold as claret of fine quality and sufficiently high price, the appellants *sent a sample of it to a Mr. *Cooper*, of *Reading*, [253 who, upon examining it, returned it, stating that the wine was wholly unfit to be offered to customers. There was no offer by the appellants to return the lots before the 14th of June, which was the day after the matter was brought into litigation, the proceedings having commenced on the 13th.

There is no doubt that the wine was delivered, and there is no doubt that it was not according to sample; but there is one matter which it was undoubtedly thrown upon the appellants to prove namely, the timeous rejection and return of the thing bought. The question is, whether that has been clearly made out and established to your Lordships' satisfaction. However unfortunate it may be for these gentlemen, I apprehend that the only conclusion to which we can properly come is that this was not done. These gentlemen had really only one thing to do, or rather one of two things to do, namely, either to take the lots and pay for them, trusting to what they might recover in a subsequent action; or to reject them at once, and notify to the vendor that they held them at his risk and disposition, and that they utterly abnegated all liability and all responsibility in respect of those wines. I say they might have done that on the 6th of May; but nothing whatever was done until the 13th of June, when the action had been brought.

I apprehend the Court would have been entitled to come to the conclusion that there had not been such a clear and distinct

(*) Mr. *Young*, Q.C.

(†) Sir *George Jessel*, Q.C.

(‡) Lord *Hatherley*.

notification of the breaking off of the contract up to at least the 13th of June (whatever there may have been on the 14th of June) as would justify these gentlemen in retaining, as they did, the goods which had been sold to them without paying the price for them.

It was suggested in argument that in effect there was no contract between the parties as to the quality of the wine. A case was cited in which a person engaged, not to sell a definite thing *in esse*, but to supply certain quantities of yarn according to sample (¹). He might supply the yarn from whencesoever he pleased; there might not be a single hank of it *in esse* at the time beyond the sample of it. He furnished some *jute* instead of flax. There the very contract was for flax, not for jute — a thing different *in rerum naturâ*; but here the contract is for certain specified wines [254] sent over by a certain firm, and lying in certain specified cellars. The parties were both of them acting *bonâ fide*. Both the vendor and the vendee thought that it was wine of the quality represented by the sample; both thought so up to the very moment of the communication from *Reading*. Those gentlemen found that when they received the goods the articles supplied were not what they conceived that they ought to be. They had it in their power either to accept them and pay for them, reserving all their rights, or to reject them and notify the rejection. It appears to me that they have not done either the one or the other, and the consequence is that they are now liable for the price.

I think, therefore, my Lords, that all that we can do is to affirm the interlocutors of the Court of Session and dismiss the appeal with costs.

LORD CHELMSFORD :

Reference has been made to the difference between the law of *England* and the law of *Scotland* as to the right of a purchaser to rescind a contract, and therefore I will say a few words upon that subject.

In *England*, if goods are sold by sample, and they are delivered and accepted by the purchaser, he cannot return them; but if he has not completely accepted them, that is, if he has taken the delivery conditionally, he has a right to keep the goods for a sufficient time to enable him to give them a fair trial, and if they are found not to correspond with the sample he is then entitled to return them.

As I understand the law of *Scotland*, although the goods have been accepted by the purchaser, yet if he find that they do not correspond with the sample, he has an absolute right to return them.

(¹) *Jaffe v. Ritchie*, 23 Dunlop, 242.

In *England*, if a horse is sold with a warranty of soundness and it turns out to be unsound, the purchaser cannot return the horse, unless there is a stipulation in the agreement that if the horse does not answer to the warranty the purchaser shall be at liberty to return it; but all that he can do is to offer to return the horse to the seller, and if the seller refuses to receive back the horse then the purchaser may sell the horse and recover the difference in price. In *Scotland*, as I understand the law of that country, there would be an absolute right to return the horse upon the discovery *of its unsoundness, without any [255 stipulation to that effect in the agreement.

The appellants here state that the wine was not conformable to contract; and that they rejected the lots and "timeously" offered to return them. I was rather astonished to hear it stated at the bar, that upon these pleas in law it was incumbent upon the respondent to show that there had not been an offer to return the wines without delay; that is, that it was the incumbent duty of the respondent to prove that which it would have been almost impossible for him to prove in this case, namely, a negative; that there had *not* been an offer to return. We were also warned, that if we decided otherwise we should change the law of *Scotland* in this respect. I do not think that the law of *Scotland* is so unreasonable as to require a party to prove a negative by way of anticipation to an affirmative defence. The appellants assumed, and, as it appears to me, properly assumed, the defence by their plea in law, and by the act of 6 Geo. 4, c. 120, their plea in law is to be held on the sole ground of their defence, and therefore I apprehend that the onus of proving that the goods had been returned, or that there had been an offer to return them, lay upon the appellants.

Now the questions which arose upon the pleas in law were these—First, did the wine correspond with the sample? Secondly, was there any improper delay in discovering the defective quality of the wines? and, thirdly, was there any improper delay in the offer to return them?

With regard to the wine not corresponding with the sample, there can be no doubt whatever that large quantities of the wine in both lots were utterly bad, and could in no way whatever be said to conform to the sample. And, therefore, upon the discovery of that fact, the appellants had a clear right, not, as appeared to be contended in the course of the argument, to retain the good wine and return the bad, but to rescind the contract for those lots altogether. The contracts being entire for each lot, the only way in which the appellants could discharge themselves from their obligation was by returning, or offering to return, the whole of the lots.

Now, was there delay in ascertaining the defective quality of the wine? It appears that at least the muddy unpleasant state of the wine might have been discovered in the course of a week, [256] perhaps, *at the most. And therefore, I think that the time which was taken by the appellants before they discovered these defects, amounted to an improper delay.

But with regard to the offer to return the lots, the case is so perfectly clear against the appellants that I should be content to rest my opinion entirely upon that point alone. Where a party desires to rescind a purchase upon the ground that the quality of the goods does not correspond with the sample, it is his duty to make a distinct offer to return, or in fact to return the goods by stating to the vendor that the goods are at his risk, that they no longer belong to the purchaser, that the purchaser rejects them, that he throws them back upon the vendor's hands, and that the contract is rescinded.

Now, was there any such offer made on the part of the appellants in this case? I am quite clear that there never has been, from first to last, any such distinct notice or offer to return the goods as was required to enable the purchaser to throw up the contract, and so to relieve himself from the liability of paying the price of these goods; and therefore I think, with my noble and learned friend, that the interlocutor ought to be affirmed.

LORD COLONSAY :

The point we have now to determine is, whether the appellants did in due time offer to return the goods — or rather reject the goods; because rejection implies all that was necessary upon their part, as purchasers of the goods, when they found that they did not accord with the samples. Now, it appears that neither was there a timeous notice of the goods being disconform to sample, nor was there throughout, until the 14th of June (and I doubt if even then), an offer or a proposal to return them, or a doing of that which was necessary to their rejection.

It appears that very soon after the sale the appellants obtained samples, called in a skilled person to assist in examining them, and, being satisfied, they sent for and obtained the goods. A month elapsed before they did anything. It was not till the 6th of May that any positive objection was made to the particular lots. The matter went on in this way. Certain objections were taken; a correspondence ensued; but never at any stage — certainly not [257] *until the 14th of June — does it appear that they rejected, in the proper and legal mode, those particular parcels. They did not state that they were at the risk of the seller; in short, they did not fulfil that which, for such a purpose, is incumbent upon a purchaser. They retained the goods and refused to pay the price for them.

Both parties were wrong in their views of the laws in the early part of these proceedings. It appears that the respondent was of opinion that all the purchases made at that sale were to be regarded as one transaction, and that it was not competent to the appellants to object to any particular lots of the purchase. The appellants were under that impression too; but the judgment pronounced by the Lord Ordinary ⁽¹⁾ was that each lot was to be dealt with as a separate purchase. The sending of the summons to the agent of the appellants, requesting him to accept the service for his clients, and his acceptance, is the strongest possible intimation that he no longer considered that they had then any right to rescind the contract.

The cases which have been referred to as impeaching the doctrine laid down by the Judges in this case are not at all in point, particularly the case of *Jaffe v. Ritchie* ⁽²⁾, which is wholly away from it. There the purchase was of flax yarn, and it turned out, when the bleacher came to examine the goods, that a large portion was not flax, but jute. It was held that the party was not bound to take jute instead of flax—a different article. I therefore my Lords, come to the same conclusion as that of my noble and learned friends.

LORD CAIRNS:

My Lords, I entirely agree with the judgment now proposed to be pronounced.

Interlocutors complained of affirmed, and appeal dismissed with costs.

Agent for the Appellants: *R. M. Gloag.*

Agents for the Respondents: *Simson & Wakeford.*

⁽¹⁾ Lord Gifford.

⁽²⁾ 28 Dunlop, 242.

In executory contracts of sale if the vendee accept goods thereunder and do not, after a reasonable time for inspection, offer to return them, or notify the vendor to take them back he cannot recover damages upon the theory that they were not of the quality or description called for by the contract. *Reed v. Randall*, 29 N. Y., 358; *Youngs v. Kent*, 2 Sweeney, 248; *Weaver v. Wisner*, 51 Barbour, 638; *Leavenworth v. Parker*, 52 Barb., 133; *Woodruff v. Peterson*, 52 Barb., 252; *Delafield v. De Grae*, 3 Keyes, 467, 471; 9 Bosw., 1.

So by acceptance the vendee waives a right to insist that the goods are short in weight. *Fitch v. Carpenter*, 43 Barb., 40.

If the defect be not apparent the vendee is entitled to an opportunity, and a reasonable time to ascertain the defects. If then discovered he is bound to give notice to the vendor or offer to return

the property. *Leavenworth v. Parker*, 52 Barb., 132.

But an acceptance of the goods does not waive a right of action for fraud practiced by the seller in packing the goods. *Willard v. Merrett*, 45 Barb., 295; *Woodruff v. Peterson*, 51 Barb., 252.

So a vendee may recover on an express warranty notwithstanding he receive and retains the property. *Rust v. Eckler*, 41 N. Y., 488; *Gilson v. Bingham*, 43 Vermont, 410; S. C., 11 Am. Law Reg., N. S., 73; *Wells v. Selwood*, 61 Barb., 238.

Though the warranty be made on delivery of the goods, if the vendee has not paid for them. *Vincent v. Leland*, 100 Mass., 432; but see *Roscorla v. Thomas*, 3 Queen's Bench, 234; 43 Eng. C.L., S. C., 1 N. Y. Leg. Obs., 220, as to the validity of a warranty after purchase. The latter case however, was consistent with a warranty after sale and delivery, so that it was without consideration.

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WILLIAM RAINY, Appellant;

AND

ALEXANDER BRAVO, Respondent.

287] *ON APPEAL FROM THE SUPREME COURT OF THE SETTLEMENT
OF SIERRA LEONE.

[Law Reports, 4 Privy Council Cases, 287.]

Action for libel — Letter containing libel destroyed by defendant — Secondary evidence — Variance between defamatory words alleged in declaration and proof — Sierra Leone Ordinance, No. 4 of 1863 — Trial by Judge without jury — Amendment of declaration, time to apply for — Discretion of Judge.

In an action of libel the defamatory words set out in the declaration must be proved as laid, and it is a fatal variance if the words as alleged are materially qualified by evidence of words not contained in the declaration, although such words as qualified are still libellous.

The defendant, after the publication of a libel and before the action was brought, destroyed the letter containing the libellous words:

Held, that, as the defamatory writing was not in existence, secondary evidence of the contents of the letter by witnesses who heard it read was admissible, but that the actual words used as laid in the declaration must be proved, and not the substance or impression the witnesses received of the words, as otherwise the witnesses, and not the Court or jury, would be made the judges of what was a libel.

THIS was an action of libel brought in the Supreme Court of *Sierra Leone* by the appellant, a barrister practising as an advocate and attorney in the Courts in the colony, against the respondent, a police magistrate in that colony.

The first and second counts of the plaintiff's declaration set out the libel as follows: "Tell *Gilpin*" (meaning thereby that a certain person was to tell one *Gilpin*, who was a client of the plaintiff's) "that I have prohibited Mr. *Rainy* from practising in my Court" (meaning thereby that the defendant had prohibited the plaintiff from practising in his said profession in the police court of *Freetown*), "and there was no necessity for him (*Gilpin*) to employ a lawyer; but if he required a lawyer, to employ Mr. *Walcott*" (meaning another advocate and attorney-at-law of the said Supreme Court), "who was a clever lawyer, and, what is more, he is an honest man" (meaning thereby that the plaintiff was not a clever lawyer or an honest man): The plaintiff laid his damages at £3,000.

Before the plaintiff filed his declaration, he caused a notice of motion to be served on the defendant's attorney of his intention to apply to the Court for a rule calling upon the defendant to show cause why the plaintiff should not be at liberty to inspect and take a copy of the letter written by the defendant to the police clerk, and in which the libel complained of was set out.

**Present* :—SIR JAMES WILLIAM COLVILLE, SIR MONTAGUE EDWARD SMITH, and SIR ROBERT PORRETT COLLIER.

In this affidavit the libel was set forth precisely as it was subsequently laid in the declaration. In reply to this affidavit, the defendant, by an affidavit made by himself, swore "that the letter referred to in the affidavit of the plaintiff, had been torn in pieces by the defendant, and the pieces thrown in the street."

The defendant pleaded not guilty; and issue being taken thereon, the action came on for trial on the 29th of November, and the 1st and 2d of December, 1869, before His Honor, *George French*, the Chief Justice of the Supreme Court of *Sierra Leone*, without a jury, according to the provisions of the *Sierra Leone Ordinance*, No. 4 of 1866, sect. 11, which abolished trial by jury in civil actions.

At the trial the plaintiff conducted his case in person, when the following evidence, as appeared from the Chief Justice's notes relative to the libel, was given on the part of the plaintiff. *Metzger*, the police clerk, stated, "The substance of the part of the letter which I read out I recollect. It was to this effect: I was to tell *Gilpin* that his case was not a case for a lawyer, *and that he (the Major) was detained at Government [289] House, and could not come down that day. The letter said he had heard *Gilpin* had employed Mr. *Rainy* (the plaintiff), but Mr. *Rainy* was not allowed to practice in his Court until he had apologized for his conduct towards him (the defendant) whilst he was sitting on the bench at the Police Court some time before." In another part of his evidence the witness stated, "I read letter out because there was a direction in letter for me to tell *Gilpin* and the people that on account of Mr. *Rainy's* conduct towards magistrate (the defendant) he had prohibited him from practising in his Court until he had apologized for his conduct towards him." The witness further stated, in answer to a question of the Chief Justice: "there was a direction in the letter to tell *Gilpin* and people about plaintiff's conduct to defendant, and defendant having prohibited him practising in his Court until he had apologized for his conduct." *Lake*, another witness, stated, "The substance of the letter was as follows: The defendant wrote to Police Clerk, *Metzger*, to say he was at Government House, and would not be at Police Court before a certain time, which I don't now recollect; that *Gilpin* need not employ a lawyer; that it was not necessary. But at all events, if he did so, he was not to employ the plaintiff, in consequence of his conduct in his Court some days before, until he should have made ample apology; that he could employ Mr. *Walcott*, who was a clever lawyer, besides an honest man. There was a post-script to the letter to the effect, 'Read this letter publicly in Court.'" *Jarrett*, another witness, stated, "The substance of it was: Tell *Gilpin* I am going to Government House, and I will

not be back before a certain stated time. That *Metzger* was to tell *Gilpin* he did not require a lawyer, but that if he did employ one, he was to employ *Walcott*, who was an honest man, and not Mr. *Rainy*, as he had prohibited Mr. *Rainy* from practising in that Court for having insulted him some days previously." *Gilpin* another witness, stated: "The letter stated: "Tell *Gilpin* I am engaged at Government House; his case will be remanded till Wednesday: that he need not employ any lawyer; but if he is so foolish as to employ any lawyer, he need not employ *Rainy*, as he came into Court on Saturday and insulted me while on the bench, and unless he makes an apology in open Court I 290] will *not allow him to come into the Police Court." The affidavit of the appellant, and the affidavit of the defendant, hereinbefore referred to, were put in evidence at the trial on the part of the plaintiff.

No evidence was given on the part of the defendant, who did not appear either in person or by counsel at the trial, and no objection was taken by the Court during the trial to the witnesses speaking as to the substance of the letter containing the libel.

At the conclusion of the trial, the Chief Justice adjourned the case *sine die* for judgment, and on the 17th of December announced in open Court that he would deliver his judgment on the 21st of that month.

On the 21st of December, 1869, the Chief Justice proceeded to give judgment in the action, and while he was taking exception to the evidence given at the trial by the plaintiff's witnesses, as speaking only to the substance of the libel, proposed to the plaintiff that he should elect to be nonsuited; but the plaintiff submitted that, instead of being nonsuited, the declaration should be amended to make it correspond exactly with his proof. The Chief Justice refused to permit this, and subsequently declined to hear anything further from the plaintiff, insisting that it was not proper that the plaintiff should address him whilst he was giving his judgment. His Honor then gave his verdict or judgment for the defendant, chiefly on the ground, that the witnesses spoke to the substance, and not the exact words contained in the letter.

The appellant moved the Supreme Court for a rule *nisi* that the verdict be entered for him, or for a new trial in the action, and the rule was subsequently granted for a new trial only.

By an order of the Supreme Court, bearing date the 30th of March, 1870, the rule for a new trial was discharged with costs.

The present appeal was brought from this order refusing the rule for a new trial. The appellant, in his case, submitted, that the judgment ought to be reversed, and a verdict entered for

him, with such damages as their Lordships should think fit to award.

The Appellant in person :

There are three grounds upon which, I contend, the Court below was wrong in law. First, that the libel was proved; and, secondly *even if the exact words were not proved, and there [291] was a variance between the libel alleged and the evidence, the Judge ought to have allowed leave to amend the declaration; and lastly, that the Judge had no power to adjourn the trial *sine die*.

First, I submit, that the libel set forth in the declaration was sufficiently proved by the witnesses, and also by the affidavit of the respondent, who therein admits the libel. No objection was taken at the trial by the learned Judge, who tried the action without a jury, under the *Sierra Leone Ordinance*, No. 4 of 1866, sect. 11, to the witnesses speaking to their recollection of the substance of the contents of the letter containing the libel, which was alone sufficient proof, but another witness, *Gilpin*, deposed to the actual words themselves. The evidence of these witnesses proved so much of the libel as alleged in the declaration as was necessary to maintain the action, and the Judge was wrong in disregarding such evidence: *Starkie* on slander and libel, p. 345 [3d ed. by *Folkard*.] Direct evidence could not be obtained, as the respondent himself destroyed the letter containing the libel, and that being so, he could not object to secondary evidence of the contents being proved by witnesses. The Chief Justice in his judgment relied upon *Gutsole v. Mathers* (*) as an authority to justify him in rejecting the evidence of the witnesses, speaking only to the substance of the defamatory words, That case does not apply. There is no decision similar to the present case to be found in the reports. The only authority approaching the present case is *Layer's Trial* (†). That case, it is true, was an indictment for publishing a treasonable paper not in evidence, but parol evidence of the contents of the paper was allowed. Here the respondent destroyed the letter, the evidence of the libel. In such circumstances, according to the rule laid down in *Starkie* on slander and libel, p. 449, citing *Gathercole v. Miall* (‡), *Fryer v. Gathercole* (§) and *Johnson v. Hudson*, in a note to *Watts v. Fraser* (¶), where a printed libel is destroyed, evidence of a corresponding copy is admissible. I submit, that in this case secondary evidence was admissible, and that the learned Judge *improperly rejected the testimony of the [292] witnesses. The respondent, in his affidavit, admitted destroying the letter. Such admission is conclusive, and he could not contradict it if he had appeared at the trial: *Rex v. Archer* (¶).

(*) 1 M. & W., 495.

(†) 4 Ex., 262.

(‡) 6 St. Tr., 229; Note to *Rex v. Watson*, 2 T. R., 203.

(§) 7 A. & E., 232.

(¶) 15 M. & W., 319.

(¶) Note to *Rex v. Watson*, 2 T. R., 203.

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Secondly, assuming that there was a variance between the words declared on and the proof, the learned Judge refused the right to amend the declaration. The *Sierra Leone* Ordinance, No. 4 of 1866, sect. 11, provides for the trial of civil actions by a Judge without a jury, and enacts that "the proceedings upon and after such trial, as to the powers of the Court or Judge, the evidence and otherwise, shall be the same as in the case of a trial by jury." [SIR MONTAGUE SMITH: Similar provisions is made by the *Common Law Procedure Act*, 17, & 18 Vict. c. 125, sect. 1.] Under this ordinance the action was tried by the Chief Justice sitting as a jury, and he has, under the 11th sect. of that Ordinance, the same powers as a Judge of a Court of record in *England*. Had it been a jury trial I should have applied for leave to amend while the Judge was summing up. [SIR MONTAGUE SMITH: It is at that stage of the trial allowed sometimes, but only as a matter of special favor.] The proper time for the learned Judge to have intimated his opinion, that variance between the declaration and proof was fatal, was, during or at the end of the trial, when leave could have been obtained to amend, but the Judge could not in his judgment reject the evidence as to proof of the libel, after he had admitted it on the trial. From the course taken at the trial there was no means of discovering that the learned Judge had rejected the evidence of any one of the witnesses, and, I submit, it was not too late to amend when I applied: *Saunders v. Bate* (2).

Thirdly, the learned Judge had no power to adjourn his judgment *sine die*. Sect. 3 of the *Sierra Leone* ordinance applies only where the Judge from illness or absence of one of the Judges is obliged to adjourn the Court. Had he delivered judgment at once, as in the case of a Judge who tries a case with jury, on his summing up, I should then have applied to amend the declaration. Again, he was wrong in refusing to hear me when he was commenting on the evidence at the trial.

293] *Mr. A. L. Smith, for the Respondent :

The appellant's case entirely fails. First, it appears from the Judge's notes that the substance only of the letter containing the alleged libel, and not the actual words as laid in the declaration, was spoken to by the appellant's witnesses; therefore, in law, the Judge was bound to disregard such evidence, and he has found, as a matter of fact, that the witnesses only spoke to the substance.

Secondly, it is a well established rule of English law, which law prevails in *Sierra Leone*, that in an action of libel or slander the declaration must not only allege the defamatory words written or said, but proof must be given of the precise words, not the substance only, and a material variance is fatal: *Starkie* on

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evidence, p. 632 [4th ed.] The rule, that words alleged to be defamatory must be stated positively in the declaration, and proved as laid, *Starkie* on slander and libel, p. 343 [3d ed.], is established in *Wright v. Clements* ⁽¹⁾, and *Ellis v. Pike* ⁽²⁾. In *Maitland v. Goldney* ⁽³⁾ Lord *Ellenborough* says, "that the plaintiffs could not entitle themselves to recover unless all were proved." Here there is unquestionably a fatal variance. The libel declared on was a very different libel from the libel proved. The declaration sets out the defamatory words constituting the libel to be these: "Tell *Gilpin* that I have prohibited Mr. *Rainy* from practising in my Court, and there was no necessity for him, *Gilpin*, to employ a lawyer; but if he required a lawyer, to employ Mr. *Walcott*, who was a clever lawyer, and, what is more, he is an honest man." Now, the plaintiff's witnesses, prove an entirely different case. What, as appears from the witnesses' recollection of the contents of the letter, in addition to the defamatory words set out in the declaration was this: "That the appellant was not to be allowed to practise in his (the respondent's) Court unless he apologized for his conduct towards him whilst he was sitting on the bench of the Police Court some time before." Such a qualification of the words declared on as defamatory, was of vital importance, and the controlling words in the letter have not been declared on.

Thirdly, as respects the amendment of the declaration, it was too late when the appellant applied to the Judge, who sat as a jury, *when delivering judgment. He should have applied for leave to amend at the end of his case, which the Judge, in his discretion, might have allowed. The rule of this tribunal is not to interfere with the judicial discretion of a Colonial Court in a question of its forms and practice: *Grant v. The Aetna Insurance Company* ⁽⁴⁾.

Lastly, the Chief Justice had, by the *Sierra Leone Ordinance*, No. 4 of 1866, sect. 3, power to adjourn the Court, for judgment. *Reg. v. The Mayor of Clonmel* ⁽⁵⁾ is an authority that the Court has inherent power to adjourn from time to time.

The consideration of their Lordships' judgment was reserved, and now delivered by

SIR MONTAGUE SMITH:

This is an action of libel brought by the appellant, Mr. *Rainy*, a barrister practising in the colony of *Sierra Leone*, against the respondent, who was the Police Magistrate of *Freelown*, in that colony. The case was tried before the Chief Justice without a jury, who, after taking time to consider, gave judgment for the defendant on the ground, that the libel was not proved by the evidence. A rule for a new trial afterwards obtained by the

⁽¹⁾ 3 B. & Al., 503.

⁽²⁾ 4 B. C., 482.

⁽³⁾ 2 East, 487.

⁽⁴⁾ 15 Moore's P. C. Cases, 516.

⁽⁵⁾ 9 Ir. C. L. Rep. (N. S.), 267.

appellant was discharged, which has led to the present appeal. The appellant contends that the judgment is wrong on two grounds. He contends, first, that the libel was proved; and secondly, that if it was not proved and there was a variance, the Judge ought to have amended the declaration; and he incidentally complains of the adjournment as having interfered with an application for an amendment.

The alleged libel is contained in a letter written by the respondent to the clerk of his Court, which it is said was read by the clerk to several persons. It is alleged in the declaration to be in the following terms: "tell *Gilpin*" (meaning the Police Clerk) "that I have prohibited Mr. *Rainy* from practising in my Court, and there was no necessity for him, *Gilpin*, to employ a lawyer; but if he required a lawyer, to employ Mr. *Walcott*" (meaning another advocate and attorney-at-law of the said 295] *Supreme Court), "who was a clever lawyer, and what is more, he is an honest man." The latter words are thus innuendoed, meaning thereby that the plaintiff was not a clever lawyer or an honest man. The letter was destroyed by the defendant himself shortly after it was written. Four witnesses were called to prove the contents of the letter which had been destroyed. The evidence of the clerk *Metzger*, to whom it was addressed, and of two others, was disregarded by the Judge, on the ground that they gave evidence of the substance only of the letter, and not of the very words.

It is unquestionably true that the words charged to be a libel must be set out in the declaration. If the defamatory writing does not exist, and secondary evidence is offered of its contents, the words must be proved, and not what the witness conceives to be the substance or the effect of them; for otherwise witnesses, and not the Court or a jury, would be made the judges of what was a libel.

The Chief Justice seems to have had a right apprehension of the law, but their Lordships are by no means satisfied that he has not misapplied it. In this case such secondary evidence was admissible as could be obtained from the recollection of the witnesses who heard the letter read. They were bound to give the words, as far as they could recollect them, and then the inquiry would be, whether their recollection and accuracy could be trusted, and, whether the words they recollected could be relied upon as giving the material words of the libel. Although in the notes of the Chief Justice, when taken literally, it would appear that the substance and effect of the letter only was given by the witnesses, yet it seems to their Lordships that in fact the witnesses must have been giving, or intended to give, the material words of the letter as they recollected.

The evidence of the principal witness, *Joseph Metzger*, as re-

ported by the learned Chief Justice, thus appears upon his notes: "The substance of the letter which I read out I recollect, it was to this effect;" undoubtedly these words, if taken alone, would import that the witness was giving merely the effect of the letter; but their Lordships cannot think, that that is what the witness was really doing; they consider that what he was really *attempting to do was to give the words as far as [296 he recollected them, and this view of the evidence is borne out by the mode in which the note of the learned Chief Justice is subsequently taken. For the note goes on: "I was to tell *Gilpin* his case was not a case for a lawyer, and that he (the Major) was detained at Government House and could not come down that day." Then the note goes on, "The letter said;" which seems to imply that the witness was then giving his recollection of the words of the letter. The Chief Justice's note is in these terms: "The letter said he had heard *Gilpin* had employed Mr. *Rainy* (the plaintiff) but Mr. *Rainy* was not allowed to practice in his Court until he had apologized for his conduct toward him (the defendant) whilst he was sitting on the Bench of the Police Court some time before." Then, in another part of the evidence it is stated, "I read the letter out because there was a direction in the letter for me to tell *Gilpin* and the people that on account of Mr. *Rainy*'s conduct towards the magistrate (the defendant) he had prohibited him from practising in his Court until he had apologized for his conduct towards him." Therefore, the witness states what was the direction in the letter, and apparently in the words in which the direction was given, according to the best of his recollection. And again he says, in reply to a question of the Chief Justice, "There was a direction in the letter to tell *Gilpin* and the people about the plaintiff's conduct toward the defendant, and the defendant having prohibited him practising in his Court until he had apologized for his conduct."

It is not necessary to go through the other witnesses, but it seems to their Lordships that, taking the whole of the note together, the witness *Metzger*, was not merely giving the effect, or the inference that he drew from the language of the letter, but that he was endeavoring to give, as far as he could, the very words of the writing.

Their Lordships, therefore, are disposed to come to the conclusion that the learned Judge ought not to have wholly dismissed this evidence from his mind in coming to a decision upon the case.

But, assuming that this evidence ought to have been regarded, their Lordships think there was still a fatal variance between the proof and the declaration, on the ground that words greatly modifying *those alleged in the declaration are not set [297 out. The libel as it stands, substantially imputes that the ap-

pellant was prohibited generally from practising in Court, and, as pointed by the innuendo, that he was not an honest man. Their Lordships by no means desire to give an opinion upon the question, whether that innuendo is supported by the writing. The actual words, as proved, are, that the appellant was prohibited only until he had made an apology for an insult offered to the respondent. Both the passages may be defamatory, but they are libels of a very different character. When a passage contains in itself a complete charge, and is not modified by other passages in the same letter, it is not necessary to set out the whole. But it is not so in this case. The omitted words clearly change the complexion of the imputation, and affect the inference sought to be drawn from the reference to the other attorney, who is described as an honest man. Even, therefore, if the evidence which the learned Judge shut out from his consideration had been regarded, their Lordships are of opinion, that the declaration was not supported by reason of the words of the libel not being correctly set out in the declaration.*

299] *Their Lordships, therefore, will advise Her Majesty to direct that the order of the Supreme Court be varied, and that an order be made for a new trial, with leave to the appellant to amend his declaration as he shall think fit, on the terms of the defendant being allowed to plead *de novo*, and of the appellant paying the costs of the trial and all subsequent costs already incurred in the Court below.

With regard to the costs of the appeal their Lordships think, 300] *that they also must be borne by the appellant. What they propose to advise is an indulgence to him, for he did not apply to amend the pleadings at the proper time, and he refused a nonsuit when he might have had it. The subsequent costs their Lordships think are mainly attributable to what they must deem to be errors on the part of the appellant in these respects.

Their Lordships, as I have said, will humbly advise Her Majesty to the above effect, but they desire to intimate to the parties that the case appears to be one in which they might do well to agree to a *stet processus*. They cannot judicially advise that course, but they throw it out for the consideration of the parties. The effect of a *stet processus* would be that each party would pay his own costs, including the costs of the appeal; and having made this suggestion their Lordships will delay their report to Her Majesty to give the parties an opportunity of considering it (').

Solicitors for the Appellant: *Lambert & Burgin*.

Solicitor for the Respondent: *S. Spofforth*.

*The portion omitted relates to a question of practice of no consequence in this country.—N.C.M.

(') The respondent refused to agree to a *stet processus*, and taxed the costs.

DETERMINED BY THE

COURT OF QUEEN'S BENCH,

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF QUEEN'S BENCH,

IN AND AFTER

TRINITY TERM, XXXV VICTORIA.

May 22, 1872.

FRASER and others v. THE TELEGRAPH CONSTRUCTION AND MAINTENANCE COMPANY.

[Law Reports, 7 Queen's Bench, 566.]

Bill of Lading, Construction of Contract under — Description of Vessel as Steamship.

Goods were shipped by plaintiffs on board defendants' vessel, under a bill of lading, "shipped on board the steamship *Hibernia* . . . from Singapore to London . . . with liberty to call at any ports, in or out of the route, to receive and discharge coals . . . &c., and to tranship the goods by any other steamer":

Held, that the contract of the defendants was that the goods should be carried on board a ship in which the principle motive power during the voyage should be steam.

FIRST COUNT, that, in consideration that plaintiffs would at defendants' request cause to be shipped on board a certain steamship of the defendants, called the *Hibernia*, which was then possessed of such motive and propelling powers as steamships of the class of the *Hibernia* ordinarily are possessed of, certain goods, to wit, black pepper and coffee, for reward to defendants, defendants promised that they would carry the said goods in the said steamship from Singapore to London, and would during the voyage *use and employ the motive and propelling [567 powers belonging to the said steamship; that plaintiff accordingly shipped the goods; breach, that defendants did not use and employ the motive and propelling powers of the steamship in the manner in which such powers are employed by steamships in the usual course of navigation, whereby the goods were delayed on the voyage and plaintiffs lost their market.

Second count, that plaintiffs delivered to be carried in the *Hibernia* the goods as in the first count mentioned, and it became the duty of defendants to use the motive powers as in the first count mentioned; breach, that they did not.

Third count, that, in consideration that plaintiffs would ship goods on board the steamship *Hibernia*, to be carried, &c., as in

the first count defendants promised that they would carry within a reasonable time, which they did not do.

Fourth count, alleging that it was the defendants' duty to carry the goods within a reasonable time.

Fifth count, that the goods were delivered to defendants, as carriers of goods, to be carried within a reasonable time; breach, that they did not so carry.

The material pleas were a traverse of the promises and duty respectively as alleged, and of the breaches, on which issue was joined.

At the trial before Mellor, J., at the sittings in London after Michaelmas Term, 1871, it appeared that the plaintiffs are merchants at Singapore, and they in November, 1870, shipped some pepper and coffee on board the defendants' vessel the *Hibernia*, under bills of lading in the following form: "Shipped in good order and condition in the steamship *Hibernia* . . . lying off the port of Singapore, and bound for London, having liberty to call at any port or ports in or out of the customary route in any order to receive and discharge coals, cargo, and passengers, and for any other purpose . . . to tow and assist vessels . . . and to tranship the goods by any other steamer, 1796 bags black pepper, to be delivered in like good order and condition at the port of London, inter alia, damage from machinery, boilers, or steam, however caused, or from explosions, heat, or fire on board . . . default of engineer excepted, at 2*l.* per ton of 16cw*t.*."

The *Hibernia* was what is called an auxiliary screw steamer, 568] and *not a full power steamer. The captain admitted that, acting on the defendants' instructions, he had made a sailing voyage home, having originally only 500 tons of coals on board, and 50 tons remaining at the end of the voyage; but on the voyage he met with an unusual amount of calm weather. The voyage took 135 days, being longer than an ordinary voyage of a sailing vessel, and from sixty to seventy days being the average voyage of a steamer round the cape.

The plaintiffs relied on the third and fourth counts.

The learned judge left it to the jury to say whether, having regard to the nature of the vessel and the weather, the voyage had been made in a reasonable time or not.

The jury found for the defendants.

A rule was obtained for a new trial, on the ground that the judge had misdirected the jury in not telling them that the contract was for carriage in an ordinary steamship; and that the verdict was against the evidence.

Pollock, Q.C., and *Cohen* showed cause, and contended that there was no warranty in the bill of lading that the *Hibernia* was an ordinary steamship, which was what the contention for the

plaintiffs amounted to. "Shipped in the steamship *Hibernia*" was no part of the contract, it was merely the description of the vessel on board of which the goods were received.

Sir J. B. Karlake, Q.C., and *A. L. Smith* were not heard in support of the rule.

COCKBURN, C.J. I think this rule should be made absolute. The miscarriage, I think, has arisen from the virtual abandonment of the first two counts, though, undoubtedly, when we come to look at the declaration more closely, the same questions are involved in the third count, which alleges a non-performance of the contract on the part of the shipowners in not navigating with reasonable expedition. The first question which we have now to dispose of is, whether on the terms of this contract it was necessary that the ship should be a steamship. She is expressly so called in the bill of lading. The bill of lading also contains a provision, which is not unimportant, that the vessel shall be at liberty to call at *any port or ports in or [569 out of the accustomed route in order to receive or discharge coals. She is also at liberty to tranship goods into any other steamer. The effect of the whole of that is, I think, to make it incumbent on the shipowners that a vessel, by which these goods are to be shipped, and for the shipping of which goods on board the vessel the bill of lading is given, shall be a vessel propelled by steam. I am very far from saying that where it is convenient, as it often is, for a steam vessel to use sailing power instead of steam power when the wind happens to be favorable, it is necessary that the vessel should be at all times and under all circumstances propelled by steam; but the meaning of a vessel being a steamship is, that the principal motive power used shall be the power of steam, and not sails. I think that is the true meaning of this contract, and, therefore, that it should have been left to the jury to say whether the vessel had satisfied those conditions. But I must still adhere to what I said in the course of the argument, that, even supposing the true construction of the contract should be, that an auxiliary screw steamer would have satisfied the terms of the bill of lading, it appears to me that that involves that the auxiliary screw power should be used so far as it is reasonably possible. It might happen that a vessel might be driven out to sea far from a coaling port, and unable to get coal; but so far as it is practicably possible, there is an engagement that the auxiliary steam power shall be forthcoming; and it is not enough for the captain to say, "I will use my discretion in carrying out the instructions of my employer, and I will make this a sailing voyage, and therefore it is not necessary, when my coal is exhausted by adverse winds, to put into any port for coal." If the case goes down to a new trial, and it should be

thought expedient to enter into the second question, I must say that I think the evidence had much better be made more complete than it was at the first trial. But it is now enough to say that, according to the construction I put on this contract, it means that this vessel, the *Hibernia*, on which these goods were shipped, shall be a vessel being primarily and principally propelled by steam power, and not by mere sailing power. That appears not to have been the way in which the case was left to the jury, and therefore I think there should be a new trial.

570] *BLACKBURN, J. I also think there should be a new trial. The first two counts at the trial were abandoned, the plaintiffs relying on the others, which stated in substance that the goods were to be delivered in a reasonable time, and that the defendants did not deliver them, within a reasonable time, those counts also stating, I may observe, that the goods were put on board the "steamship" *Hibernia*. Now I apprehend that upon those counts what the plaintiffs were entitled to prove was that the reason why these goods were delayed was that the defendants, the shipowners, did not use reasonable exertions. If the voyage had been delayed by a storm, or by anything that may happen on a voyage without the fault of anybody, I take it that would not have proved that the defendants did not use reasonable exertions, because the delay would have been caused by something over which they had no control. What is meant is, that the defendants must make reasonable exertions under the circumstances to carry the goods on board the vessel on which they were shipped. Then it makes the greatest difference possible what was the sort of ship in which the goods were to be carried, according to the contract, and within what time it was that the contract ought to be completed, because the exertions are to be reasonable exertions, and they would vary very much with the nature of the ship. If the contract had been, "We will carry your goods on board this ship, which is a sailing ship, having an auxiliary screw, and using it at intervals when it is convenient so to do," then their duty would have been one thing; but, on the other hand, if they say, "We will carry these goods by steamship, working as a steamship, although we may, when the wind is favorable, choose to run her as a sailing vessel, and a sailing vessel only," that would involve a different kind of exertion: because in one case they would use a great deal more steam than in the other. The view that my Brother Mellor seems to have taken at the trial, and he was led to it by the course the evidence took, was to treat this as if it was clearly a contract to carry the goods by a ship using an auxiliary screw, and an auxiliary screw only. In that view of the matter I think his direction, so far as I understand it, was the right one, namely,

that the jury were to say whether the defendants used reasonable exertions, and used coal at the reasonable and usual times, at the *times which are customary and proper with an [571 auxiliary screw. But then, unfortunately, as it seems to me, on looking at the bill of lading, the contract was different. The bill of lading, notwithstanding some case that Mr. Cohen referred to in the Common Pleas ⁽¹⁾, must be taken to be the contract under which goods are shipped, and until I am told differently by a court of error, I shall so hold. [The learned judge read the material parts of the bill of lading.] I can in no way construe that as meaning more or less than this, that the goods are to be shipped on board the "steamship" *Hibernia*, which is a steamer to be worked as a steamer, with liberty to tranship to any other steamer, not on to a sailing vessel, but on board another steamer. I can only construe that as meaning that it is part of the contract that the goods are to be forwarded per steamer, that is, by a vessel worked by steam motive power principally. It is not necessary that it should be worked every day by steam power, but worked by steam power as the chief and principal power. If that is taken to be the right view of the contract, and that was to be the kind of ship that the goods were to go by, then the evidence is all on the plaintiffs' side. The defendants avowedly tried to make a sailing voyage, merely using the screw as an auxiliary, that is to say, now and then, but making it a sailing voyage, and consequently the vessel took 135 days, while a steam voyage might have been accomplished in about sixty-five days. Taking that view of the contract, I have no doubt that the plaintiffs are right, and the defendants are wrong; but taking the view my brother Mellor took of it, and the way he left it to the jury, I am not prepared to say whether the jury were right or wrong. This is a case in which it is required that the evidence should be looked at carefully, and I dare say the jury were competent judges of the matter; but, at all events, I think there ought to be a new trial, and then, if the parties question this ruling upon the construction of the contract, they can carry the case to a court of error. In my opinion the proper direction was not left to the jury, inasmuch as they should have been told that the plaintiffs *were entitled to [572 have reasonable exertions made and that the goods should have been carried by a vessel which was principally a steamer, which seems not to have been the case, and therefore I think there ought to be a new trial.

(¹) *Cohen* had referred in argument to an anonymous unreported case in the Common Pleas, in which he was understood to say it had been decided that

evidence was admissible of a parol contract that goods should not be placed on deck, although the bill of lading was in the ordinary form.

1872

Joyce v. The Realm Marine Insurance Company

LUSH, J. I am of the same opinion. I think the proper construction was not put upon the bill of lading at the trial. It was not the contract that the vessel's steam power should be used merely to supplement her sailing power when the wind failed, and when there was no other motive power; but it was to be used as the primary motive power, so as to keep her going at the same rate of speed as if she had been purely a steam vessel.

MELLOR, J. I am of the same opinion. I did not at the trial put the construction upon the contract that has been put upon it by the Court, and which, upon consideration, I entirely agree with. The way in which it was put at the trial has been correctly described by my brother Blackburn; and although I was very much struck by the concluding passage in Mr. Smith's reply, as to this vessel being out 134 or 135 days, I should not have been prepared to say judicially that I was dissatisfied with the verdict, provided my view of what was the proper question to be left to the jury turned out to be the right one. It is not necessary to give an opinion upon that now; but I may say that my impression was, that I should have found a verdict the other way myself, but I could not have said that I was judicially dissatisfied with it.

Rule absolute.

Attorneys for plaintiffs: *Shaw & Crossman.*

Attorneys for defendants: *Bircham & Co.*

May 31, 1872.

580] *JOYCE V. THE REALM MARINE INSURANCE COMPANY.

[Law Reports, 7 Queens Bench, 580.]

Marine Insurance—Construction of Policy—“To commence at and from loading at, as above,” how far qualified by other Terms of Policy—Re-insurance.

Defendants underwrote a policy of insurance for 1000*l.* declared to be upon cargo, being a re-insurance subject to all clauses and conditions of the original policy, in the ship *Daybreak*, at and from any port or ports in any order on the west coast of Africa to the vessel's port of discharge in the United Kingdom; the insurance “to commence from the loading of the goods at as above.” By the original policy the insurance was for 1000*l.* upon the cargo valued at 350*l.* of the vessel *Daybreak*, at and from Liverpool to any ports in any order backwards and forwards on the coast of Africa, and thence back to a port of discharge in the United Kingdom; with leave to increase the valuation of the cargo on the homeward voyage; outward cargo to be considered homeward interest twenty-four hours after her arrival at her first port of discharge. Goods, shipped at Liverpool, were lost by perils insured against more than twenty-four hours after the vessel had arrived at her first port of discharge on the coast of Africa:

Held, that the clause of the policy declared upon, that the insurance was to commence on the loading of the goods at as above, viz., a port on the coast of Africa, must be taken as qualified by the clause in the original policy, that outward cargo was to be considered homeward interest twenty-four hours after the ship's arrival at her first port of discharge and that the policy had therefore attached.

DECLARATION on a policy of insurance executed by the defendants, by which in consideration of 30*l.* the defendants promise

and agree with plaintiff that the company will pay and make good all such losses and damages hereinafter expressed as may happen to the subject matter of this policy, and may attach to this policy in respect to the sum of 1000*l.* hereby insured, which insurance is hereby declared to be upon cargo, being a re-insurance subject to all clauses and conditions of the original policy, and to pay, as may be paid thereon, general average and salvage charges to be settled as per foreign statement if so made up, in the ship or vessel called the *Daybreak*, lost or not lost, at and from any port or ports, place or places in any order on the west coast of Africa to the vessel's port or ports of call and of discharge in the United Kingdom, and the said company promises and agrees that the insurance aforesaid shall commence upon the freight and goods or merchandise aforesaid from the loading of the said goods or merchandise on board the said ship or vessel at as above, and continue until the said goods and merchandise be discharged *and safely landed at as above. . . . [581

That it was a clause and condition of the said original policy that the insurance made by the said original policy should be for 1000*l.* upon the cargo valued at 3350*l.* of the said vessel *Daybreak* at and from Liverpool to any port or ports, place or places in any order backwards and forwards and forwards and backwards, on the coast of Africa and African islands, during her stay and trade there, and thence back to a port of call ^{and} discharge in the United Kingdom, with leave to call at or off any ports or places for any purpose, and to discharge, exchange, and take on board goods wherever she might call at or proceed to, and to tranship, sell, or barter all or any goods or property on the coast of Africa and African islands with any vessels, boats, factories, and canoes, and to transfer interest from this vessel to any other vessels, and from any other vessels to this vessel in port and at sea, without being deemed a deviation; with leave to increase the valuation of the cargo on the homeward voyage; outward cargo to be considered homeward interest twenty-four hours after her arrival at her first port of discharge. That divers goods, being the goods in the first named policy mentioned, were shipped at Liverpool, and the said vessel with the said goods on board departed from a port or place on the west coast of Africa, to wit, Cabenda, on and in the course of the said voyage in the original policy described as aforesaid, and afterwards while the said ship was proceeding on her said voyage within the meaning of both the policies, and more than twenty-four hours after she had arrived at her first port of discharge within the meaning of the original policy, and during the continuance of the said risk, the said goods being then on board of the said ship were by the perils insured against by the said ori

ginal policy wholly lost, and the sum of 1000*l.* became payable and was paid on the said original policy in respect of such loss.

Demurrer, on the ground that it appears from the declaration that the goods were not loaded at any port or place on the west coast of Africa.

Joinder in demurrer.

G. Wood Hill, for the defendants. The risk had not attached on this policy, the goods not having been loaded on the coast 582] of *Africa. The insurance is from ports on the west coast of Africa to ports in the United Kingdom; "beginning the insurance from the loading at as above," that is, a port on the west coast of Africa, *prima facie*, must mean that the risk is not to commence till at least some goods are loaded there: *Rickman v. Carstairs* ⁽¹⁾; and in the present case no goods had been loaded there. There must at least have been a constructive loading by a removal and reloading of part: *Carr v. Montefiore* ⁽²⁾; see the judgment of Cockburn, C.J., citing *Nonnen v. Kettlewell* ⁽³⁾. That case was affirmed in error on the same ground ⁽⁴⁾. It will, however, be said for the plaintiff, that this is a re-insurance, subject to all the conditions of the original insurance; and reliance will be placed on the clause, "Outward cargo to be considered homeward interest twenty-four hours after the ship arrived at her first port of discharge." But that clause immediately follows the clause, "With leave to increase the valuation of the cargo on the homeward voyage;" and refers simply to the mode of valuation. The original policy being from Liverpool to any port of Africa and back on cargo valued at 3350*l.*, it became necessary to say, as they might increase the value of the homeward cargo, when the homeward cargo should be taken to be loaded for the purpose of valuation; and it was for that purpose alone, and not for the purpose of anticipating or putting forward the time at which the policy was to attach. The defendants have only undertaken to re-insure the homeward cargo from the loading; and the above clause having reference only to valuation cannot be imported into the present policy, so as to make the risk attach before the loading.

[BLACKBURN, J. In *Rickman v. Carstairs* ⁽⁵⁾ *Bell v. Hobson* ⁽⁶⁾ is referred to, and in that case it was held that the policy, being in continuation of others, must, notwithstanding the words "beginning the insurance upon the loading of the goods," be taken as intended to cover goods previously loaded; that is very much like the present case.]

⁽¹⁾ 5 B. & Ad., 651.

⁽²⁾ 5 B. & S. at pp. 422; 33 L. J. (Q.B.),

57.

⁽³⁾ 16 East, 176.

⁽⁴⁾ 5 B. & S., 425; 23 L. J. (Q.B.), 256.

⁽⁵⁾ 5 B. & Ad. at p. 663.

⁽⁶⁾ 16 East, 241.

In that case the policy was in continuation of others, and therefore it might well be meant that the risk should be taken up when *the other policies ceased; but this is a re-insurance, [583 by which the plaintiff is seeking to get rid of part of his liability, and the question is, what part. He has said in distinct words, no doubt, that it is a re-insurance subject to all the conditions of the original policy: but that is as to the perils, general average, &c.; and it is distinctly said that the insurance is to commence on the loading on the coast of Africa; the risk, therefore, in the present case, had not attached, no goods having been loaded there.

Herschell, Q.C. (with him *Gully*), for the plaintiff, was not called upon.

BLACKBURN, J. Notwithstanding the able argument for the defendants, I think that our judgment must be for the plaintiff. The ordinary and general rule in the case of a policy of insurance, of course, is that we must construe the policy as we find it; it is in a printed form, with written parts introduced into it, and we are to take the whole together, both the written and the printed parts. Although it has sometimes endeavored to be argued that we ought to bestow no more attention on the written parts than on the printed parts which are uniform in most policies of insurance, there is no doubt that we do, and ought to, make a difference between them. The part that is specially put into a particular instrument is naturally more in harmony with what the parties are intending than the other, although it must not be used to reject the other, or to make it have no effect. One of the usual printed parts of a policy, and here it has not been struck out, is that the "insurance shall commence on the freight and goods and merchandise from the loading of the said goods and merchandise on board the said ship or vessel at as above," which would refer to the voyage above mentioned. That means that the underwriters are not responsible for the goods until they are put on board the ship for the voyage that is insured against, unless there is something stated to the contrary; and so it has been decided. But then in *Bell v. Hobson* ⁽¹⁾, which rather derogates from that rule, Lord Ellenborough says it had been held that the words "beginning the adventure from the loading on board" were to be confined to the place from whence the risk commenced. "But," he says, "if *there [584 be anything to indicate that a prior loading was contemplated by the parties, it will release the case from that strict construction." That I understand to mean, that if there be anything on the face of the written instrument (we cannot construe it as importing other matters) to show that the loading was to commence

(1) 16 East., 240, 243.

at a prior time, or that the word loading was used in a sense different from the mere putting on board, then it shall prevail. In the particular case Lord Ellenborough was speaking of there was a policy on the goods, beginning the adventure upon the said goods from the loading on board the said ship, which would apparently mean goods loaded at Gottenburg; but it was stated to be in continuation of policies which were on goods from Virginia to Gottenburg, inter alia, and it being stated to be in continuation of those policies, Lord Ellenborough says, "Can there be anything more indicative of such an understanding between the parties than the statement made at the foot of this policy, that it was in continuation of former policies, which were distinctly upon a voyage from Virginia? This was taking up the voyage from the period in the former policies. The conclusion, therefore, which was drawn in *Spitta v. Woodman*"⁽¹⁾ (that is, that they were to be loaded during the voyage) "is completely rebutted by the reference in this policy to an antecedent loading." Now what is there in that reasoning, which seems to me to be very good sense and very just reasoning, which does not apply here? Here it is said that this is an insurance of 1000*l.*, "which insurance is hereby declared to be upon cargo, being a re-insurance subject to all clauses and conditions in the original policy, and to pay, as may be paid thereon, general average and salvage charges to be settled as per foreign statement;" and then it proceeds immediately afterwards to say "lost or not lost, at and from any port or ports, place or places, in any order, on the west coast of Africa, to the vessel's port or ports of call and of discharge in the United Kingdom. And the said company promises and agrees that the insurance aforesaid shall commence upon the freight and goods or merchandise aforesaid from the loading of the said goods or merchandise on board the said ship or vessel at as above, and continue until the said goods or merchandise be discharged and safely landed at as above." If there
585] *was nothing to show that the parties contemplated to begin earlier, or to take up a prior loading, the goods insured would appear to be goods shipped on the coast of Africa, and not the outward cargo; but when we look at the original policy, of which the present policy is a re-insurance, and it is said to have all the clauses and conditions of the original policy included in it, we find a policy which, no doubt, began upon cargo at and from Liverpool to any ports in Africa, and backwards and forwards to the United Kingdom with liberty to discharge, &c., valued at 3350*l.*, "with leave to increase the valuation of the cargo on the homeward voyage, outward cargo to be deemed homeward interest twenty-four hours after her arrival at her

(1) 2 Taunton, 418.

first port of discharge." Now from that it appears that the original policy was to cover the goods that were put on board at Liverpool, the outward cargo from Liverpool, to cover the cargo whilst at Africa, and to cover the cargo homeward from Africa. I quite agree with Mr. Mill that it was quite necessary for the insured, who had leave to increase their valuation of the cargo on the homeward voyage, to say which was which; and they say that the cargo loaded at Liverpool, when it had been twenty-four hours on the coast of Africa, and going backwards and forwards, was to be considered as on the homeward voyage. So that the re-insurance, we may presume, was made after the ship had arrived on the coast of Africa, and does not cover or propose to cover any portion of the risk out to Africa. But it does not appear quite as distinctly as in *Bell v. Hobson* (¹), on the face of the policy, that it was intended to cover goods, as loaded in that sense at Africa, that were on board the ship twenty-four hours after her arrival there, which in the former policy was declared to be considered between the parties as part of the homeward interest. It seems to me to be clearly shown that they did so mean; that the underwriters meant to say, "We run the risk whilst the ship is at Africa, on all the cargo that is on board at Africa, although it may have been put on board at Liverpool, for such was the prior policy that we are undertaking to re-insure." Taking that view of the matter, I think the plaintiff is right in his declaration, and that the judgment should be for him.

MELLOR, J. I am of the same opinion. I think *Bell v. Hobson* (¹) *an abundant authority on the question raised in [586 this case.

LUSH, J. I am of the same opinion. The policy in question is a re-assurance. It is an agreement by way of indemnity to the plaintiff, the underwriter on the original policy, for the risk he had incurred on the homeward voyage. He had insured out and home, and this policy undertakes to guaranty and indemnify him against the risks he had incurred upon the homeward voyage. The policy says it shall be subject to all the clauses and conditions of the original policy. The defendants' risk is stated to commence from the loading of the goods on board the ship at some port or place on the coast of Africa; but by one clause in the original policy the plaintiff had agreed, in effect, that whatever portion of the outward cargo might remain on board for twenty-four hours after the arrival of the vessel on the coast of Africa, that portion should be deemed to have been shipped upon the homeward voyage. That I take to be the

(¹) 16 East, 240.

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meaning and effect of the words "outward cargo to be deemed homeward interest twenty-four hours after her arrival at her first port of discharge." The parties had agreed, therefore, that whatever remained of the outward cargo should be just in the same condition as to the liability of the underwriter as if it had been shipped on the coast of Africa on the homeward voyage. Then the defendants say, "We will re-insure, from the west coast of Africa home, subject to all the clauses and conditions of the former policy;" and I think that at once enables us to put a meaning upon the terms which express the time when the risk upon the goods was to commence, viz., "From the loading thereof on board the said ship." It shows that what was meant between the parties was not the actual loading, but a constructive loading, which was what the original underwriters had agreed to treat as a loading on board for the purpose of the homeward voyage.

Judgment for the plaintiff.

Attorneys for plaintiff: *Chester & Urquhart, for J. H. E. Gill, Liverpool.*

Attorneys for defendants: *Dewman, Dale, & Stretton.*

July 6, 1872.

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[Law Reports, 7 Queen's Bench, 594.]

Detinue — Bailor and Bailee — Wharfinger — Warrants.

Certain cases of wine were ordered by L. of the plaintiff, and were shipped by the plaintiff consigned to L., who deposited the bill of lading with the defendant, a wharfinger, with directions to take delivery and warehouse the wine on L.'s account. The wine, on its arrival, was entered at defendant's wharf in L.'s name, subject to a stop for the freight. L. afterwards refused to accept the wine on the ground that it was not according to contract; the plaintiff agreed to take it back, and L. promised to send a delivery order to enable the plaintiff to obtain it; but on the same day L. indorsed the bill of lading to M., which M. took to the defendant's wharf and procured a transfer of the wine into his own name. The plaintiff was afterwards informed by L. that the wine was at the disposal of the plaintiff, but subject to charges amounting to 17l. 14s. 9d., and 5l. for loss of profit. At an interview between M. and the plaintiff M. offered to give up the wine on payment of the above sums. The plaintiff tendered the former sum which M. would not accept. The plaintiff's attorney afterwards offered to the defendant to pay all charges, and to indemnify him against the claim of any other person. The defendant refused to deliver the wine to the plaintiff, alleging that he had given warrants to M. The wine was ultimately delivered to a third person by M.'s order. M. had in fact the freight, and obtained warrants to him or his order. The jury found that the transaction between M. and L. was colorable and with knowledge on the part of M. of the intention of L. to deprive the plaintiff of the wine:

Held, power having been reserved to the Court to draw inferences of fact, that the defendant received the wine as bailee to L., and after the payment of the freight could have no better title than his bailor; that by the finding of the jury M. had no better title than L.; and, as the plaintiff had tendered the amount of charges both to M. and the defendant, the plaintiff's title was as valid against the defendant as it would have been against L.; and that the defendant was liable to the plaintiff for the value of the wine.

DETINUE for 200 cases of wine.

Pleas: 1. Not guilty; 2. Not possessed.

At the trial before Cockburn, C.J., at the Middlesex sitting after Trinity Term, 1871, a verdict was found for the plaintiff for 150*l.*, with leave to move to enter a verdict for the defendant.

The facts of the case, the course at the trial, and the arguments appear in the judgment.

April 24. *Gibbons* showed cause.

Ingham, in support of the rule.

*The following authorities were cited: *Chessman v. [595 Exall* ⁽¹⁾; *Ogle v. Atkinson* ⁽²⁾; *Gurney v. Behrend* ⁽³⁾; *Wilson v. Anderton* ⁽⁴⁾; *Cuming v. Brown* ⁽⁵⁾; *Meyerstein v. Barber* ⁽⁶⁾; *Brandt v. Bawlbj* ⁽⁷⁾; *Williams v. Eccrell* ⁽⁸⁾; *Walker v. Rostron* ⁽⁹⁾; *Wood v. Leadbitter* ⁽¹⁰⁾.
Cur. adv. vult.

July 6. The judgment of the Court (Cockburn, C.J., Mellor and Lush, JJ.) was delivered by

MELLOR, J. This was an action of detinue to recover 200 cases of wine, which had been deposited by one Leah with the defendant, the proprietor of a sufferance wharf, under the following circumstances.

The wine had been ordered by Leah of the plaintiff, and was shipped by him, consigned to Leah, on the 20th of January, 1870. The bill of lading and invoice were forwarded in due course. Before the arrival of the vessel, which was on the 12th of February, 1870, Leah deposited the bill of lading at the defendant's wharf, with directions to take delivery and warehouse the goods on his account. This was done; the shipowner putting on a stop order for freight, pursuant to 25 & 26 Vict. c. 63, s. 68, and the wine was entered in Leah's name, subject to the freight. On the 19th of February, Leah, having in the mean time sampled the wines, gave notice to the plaintiff that they were not according to contract, and that he refused to accept them. A correspondence thereupon ensued, which led to no satisfactory result, and on the 19th of April the plaintiff came to London and called on Leah, when it was agreed that the wine should be taken back, and Leah promised to send a delivery order to enable the plaintiff to obtain it. This, however, he failed to do. It appeared that on the same day on which he had thus promised to deliver to the plaintiff, he had indorsed the bill of lading to Magnus, and that Magnus took it to the defendant and procured a transfer of the goods into his own

(1) 6 Ex., 341; 20 L.J. (Ex.), 209.

(2) 5 Taunt., 759.

(3) 2 E. & B., 622; 23 L.J. (Q.B.), 265.

(4) 1 B. & Ad., 450.

(5) 9 East, 506.

(6) Law Rep., 4 H.L., 317.

(7) 2 B. & Ad., 932.

(8) 14 East, 583.

(9) 9 M. & W., 411.

(10) 13 M. & W., 838.

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596] *name. In the beginning of May the plaintiff, not having succeeded in obtaining the delivery order, called at the docks to make inquiry, and in consequence of what then took place, his attorney wrote to Leah on the subject, and received an answer that the wine was at the disposal of the plaintiff, but subject to charges which were stated to amount to 22*l.* 14*s.* 9*d.* After an ineffectual attempt to see Leah, an appointment was made to meet at the office of the plaintiff's attorney on the 27th of May, when, instead of Leah, Magnus came. He said he was ready to give up the wine on payment of the sum which had previously been named by Leah. That amount, according to an account which he then showed, was made up of 17*l.* 14*s.* 9*d.* for charges and to 5*l.* for loss of profit. The attorney tendered the former sum, but refused to pay the 5*l.* for loss of profit. Magnus promised to see Leah and send an answer the same afternoon; but this he never did.

On the 10th of June, the plaintiff's attorney, having ascertained where the wines were deposited, called on the defendant, showed the correspondence to his manager, and explained the transaction, and then, in order to get possession of the goods, offered to pay all the charges and indemnify the defendant against the claim of any other person. The defendant refused to deliver on the ground that he had given warrants for the wine to Magnus. Ultimately the wines were delivered up to another person by Magnus's order.

It further appeared that Magnus, into whose name the wine had as above stated been transferred on the 19th of April, had on the 3d of June paid the freight, and obtained warrants for delivery to him or his order, and that a transfer had then been made from "Magnus" to "warrants."

Magnus stated at the trial that he had *bonâ fide* advanced money to Leah on the wine; but this was negatived by the jury, who found that the transaction between Magnus and Leah was colorable, and with knowledge on the part of Magnus of the intention of Leah to deprive the plaintiff of the wine.

The Lord Chief Justice thereupon directed a verdict to be entered for the plaintiff for 150*l.* with leave to the defendant to move subject to the finding of the jury, to enter a verdict for him; the Court to have power to draw any inference of fact not inconsistent with the finding.

597] *A rule to show cause was accordingly granted, and was argued in last Easter Term before the Lord Chief Justice, myself, and my Brother Lush.

It was admitted that Leah, if he had been the defendant, would have had no answer to the action; but it was ingeniously contended by Mr. Ingham, that as the defendant received the goods

from the shipowner subject to his lien for freight, he stood in all respects in the position of the shipowner, and when the freight was paid, was bound to deliver according to the bill of lading; and that the transfer by direction of Leah to Magnus, and the giving delivery warrants to Magnus, amounted to a delivery to Leah, and discharged the defendant.

We are of opinion that this argument is fallacious. The defendant received the goods as bailee to Leah, and although he might have justified detaining them on behalf of the shipowner for his freight, yet, when that was paid, he held in no other than the ordinary relation of bailee, and could have no better title than his bailor had. Then, by the finding of the jury, Magnus had no better title than Leah, and, as the plaintiff had tendered the amount of charges both to Magnus and the defendant, the plaintiff's title was as good against the defendant as it would have been against Leah. We therefore discharge the rule.

Rule discharged.

Attorney for plaintiff: *G. F. Parker.*

Attorney for defendant: *John Frost.*

July 6, 1872.

*ARMSTRONG V. STOKES and others.

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[Law Reports, 7 Queen's Bench, 598.]

Principal and Agent — Liability of Undisclosed Principal — Payment to Agent by Principal while still unknown to other Party.

A vendor, who has given credit to an agent, believing him to be the principal cannot recover against the undisclosed principal, if the principal has *bonâ fide* paid the agent at a time when the vendor still gave credit to the agent and knew of no one else as principal.

R. & Co. were commission merchants, acting sometimes for themselves and sometimes as agents. Plaintiff, a merchant, had had dealings with them, and had never inquired whether they had principals or not, and had always settled with them. On the 15th of June plaintiff contracted to sell to R. & Co. 200 pieces of shirtings at a certain price, payment to be made in thirty days after delivery, with a discount of $1\frac{1}{2}$ per cent. Plaintiff delivered the shirtings (which were grey or unbleached shirtings), and the payment ought to have been made on Friday the 25th of August. On the 24th R. & Co. asked for delay till the next pay day, September the 1st; and while plaintiff was considering what to do, R. & Co. on the 30th of August stopped payment. It turned out that R. & Co. had bought the goods for defendants under the following circumstances:

Defendants, merchants, had been in the habit of giving orders to R. & Co. for white and grey shirtings; when white were ordered, R. & Co. went into the market, bought grey shirtings, had them bleached, and charged defendants with the price of the grey shirtings and of the bleaching, and 1 per cent on the aggregate as their commission, with the charges of packing, &c. In previous transactions defendants had always paid R. & Co., generally in cash, i.e., on the next weekly pay day, and had never been brought into communication with those who supplied or those who bleached the goods. In the present case defendants gave a verbal order for 200 white shirtings, the price not being named, nor the mode of payment. R. & Co. having received the grey shirtings from plaintiff, got them bleached, and sent them to defendants, charging the price at which they had bought of plaintiff, the cost of bleaching, and 1 per cent. on the aggregate of those

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two sums, with the charges of packing, &c.; and defendants, with perfect good faith, paid R. & Co. on the next pay day after they received them, viz., on the 11th of August. On the above facts, the Court having power to draw inferences:

Held, first, that the delay of plaintiff in taking no steps between the 25th and 30th of August was not laches such as would have precluded him, if otherwise entitled, from recovering payment from defendants; secondly,—assuming that there was authority, from the course of dealing between defendants and R. & Co., to establish privity of contract between defendants and those from whom R. & Co. obtained the goods,—that, after the bonâ fide payment by defendants to R. & Co., at a time when plaintiff still gave sole credit to R. & Co., and knew of no one else as principal, plaintiff could not come upon defendants for the price.

DECLARATION for goods sold and delivered, goods bargained and sold, work and labor, and on accounts stated.

599] *Pleas: 1. Never indebted. 2. Payment. 3. As to the sale of the goods, a special plea (as to which see note 6).

Issue joined on all the pleas; demurrer to third plea and joinder.

At the trial of the issues of fact before Mellor, J., at the Manchester Spring Assizes, 1871, a verdict passed for the plaintiff, with leave to move to enter a verdict for the defendants, the Court to have power to draw inferences of fact.

A rule was obtained accordingly, on the ground that there was no evidence of a contract between the plaintiff and the defendants; and also on the ground that, under the circumstances, the plaintiff had no right to come upon the defendants for payment.

June 15, 17. *Holker*, Q.C., and *J. Edwards*, showed cause.

Herschell, Q.C., and *Crompton*, in support of the rule.

The arguments fully appear from the judgment of the Court. In addition to the authorities noticed in the judgment, the following were referred to: *Story on Agency*, § 449; *Smethurst v. Mitchell* ⁽¹⁾; *Ex parte White* ⁽²⁾; *Bostock v. Jardine* ⁽³⁾; *Horsfall v. Fauntleroy* ⁽⁴⁾. *Cur. adv. vult.*

July 6. The judgment of the Court (Blackburn, Mellor, and Lush, JJ.) was delivered by

BLACKBURN, J. ⁽⁵⁾. This was an action for goods sold and delivered. The third plea was demurred to, and issue was also taken upon it. The issue in fact was tried before my brother Mellor, when the verdict was entered for the plaintiff, with leave to move to enter the verdict for the defendants. A rule was accordingly obtained, against which cause was shown at the sittings after this term before my Brothers Mellor, Lush, and myself, and at the same time the demurrer was argued. We thought the plea was good, and gave judgment at once for the defendant on the demurrer ⁽⁶⁾; but on the rule the question was,

⁽¹⁾ 1 E. & B., 622; 23 L. J. (Q. B.), 241, 246.

⁽²⁾ Law Rep., 6 Ch. App., 397.

⁽³⁾ 3 H. & C., 700.

⁽⁴⁾ 10 B. & C., 755.

⁽⁵⁾ The judgment was read by Mellor, J.

⁽⁶⁾ The plea stated the facts very

whether the substance *of the plea, that is, enough of it [600 to constitute a defence, had been proved, and in order to determine that it is necessary to state what the evidence at the trial was.

It was proved that Messrs. J. & O. Ryder & Co., were commission merchants carrying on business at Manchester, sometimes for themselves, and sometimes acting in pursuance of orders from constituents. They were not brokers professing never to act for themselves. The plaintiff, who was a merchant at Manchester, had had previous dealings with Ryder & Co., in the course of which it appeared that he had never inquired whether they had constituents or not. All former transactions had been duly settled between him and J. & O. Ryder, so that the question had never become material.

On the 15th of June, 1871, the plaintiff's salesman made a contract with J. & O. Ryder's salesman, which, as taken down in the plaintiff's book, was as follows: "15th June, 1871. J. & O. Ryder & Co., 205 pieces 33-inch 17 square shirtings, 75 yards at 20s. 6d., 250 l., 1½ per cent., 30 days." The meaning of this was explained to be that the shirtings were to be paid for thirty days after delivery, and then with a deduction of 1½ per cent. from the nominal price. As we understood the evidence, this is an ordinary mode of dealing, though the more usual terms in the Manchester market are cash, subject to a discount, varying according to the rate of interest and the agreement of the parties, the rate at this time being about 2 or 2½ per cent. When the agreement is for cash the goods are, in practice, delivered without actual payment, and the price, less the discount, is paid a few days afterwards, generally on the Friday following, that being the ordinary pay day. When this practice is pursued, there is a period during which the seller has parted with his vendor's lien before receiving the money, though he is probably not bound to do so, as where he has, by the contract, given credit, and the period is much shorter than where credit has been stipulated for.

On the 24th of July the plaintiff sent the goods, which were *grey, that is, unbleached shirtings, to J. & O. Ryder with [601 an invoice, debiting them with the price after deducting the discount, viz. 205l. The period of thirty days would elapse on the 23d of August, but J. & O. Ryder's pay day being Friday,

much as they are stated in the judgment, but it alleged in addition that Ryder & Co., were indebted to the defendants after the 11th of August up to their stoppage; and that the plaintiff negligently let the payment from Ryder & Co. to him stand over a long time

after the 25th of August when it became due, and permitted them to retain the money in their hands till they stopped payment. The demurrer was not argued, the plaintiff's counsel at once yielding to the expression of the opinion of the Court that the plea was good.

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actual payment would not, had all gone right, have been made till the 25th of August.

On the 24th the plaintiff received a memorandum from J. & O. Ryder, requesting him to delay applying for payment till the following Friday, September 1st. Nevertheless, his salesman did call upon the 25th, but was refused payment, and told it would be all right on next Friday. The plaintiff saw in the newspaper an announcement of the death of one of the partners in the firm of J. & O. Ryder, and attributed the delay to this. He was, to use his own phrase in his evidence, considering what to do, but had done nothing, when, on the 30th of August, J. & O. Ryder & Co. stopped payment.

One point that was raised for the defendants may as well be disposed of here. We think that if the plaintiff had, on the non-payment by J. & O. Ryder, any right to come on the defendants, the taking no active step before the 30th was no evidence of any such laches as would deprive him of that right.

To proceed with the evidence. It was not pretended on either side that the plaintiff knew before the 30th of August that the defendants had anything to do with this transaction, so as to afford any evidence, on the one hand, that he had originally parted with the goods on the credit of the defendants, or, on the other hand, that he had elected to give credit to J. & O. Ryder to the exclusion of the defendants. But, after the stoppage, of J. & O. Ryder & Co., on examining their books it was discovered that in this case they had been acting as commission merchants for the defendants, and the plaintiff's case was, that, under the circumstances, he was entitled to demand payment from the defendants, as being undisclosed principals of J. & O. Ryder in this transaction.

The evidence as to this was, that the defendants are merchants at Liverpool, who had often before given orders to J. & O. Ryder, sometimes for grey and sometimes for white (that is, bleached) shirtings. When such an order had been previously given for white shirtings, the course of business had always been for J. & O. Ryder to procure grey shirtings, and then to have those grey shirtings bleached, and when they were bleached to deliver them to the defendants, charging them with the cost of the grey shirtings and of the bleaching, with one per cent. commission on that amount for placing the order, and also with any charges for packing, &c., and this amount the defendants always paid to J. & O. Ryder. As the defendants knew that J. & O. Ryder were neither manufacturers nor bleachers, they were, of course, aware that J. & O. Ryder must have procured some one to supply the grey cloths and some one to bleach them; but they never were, in any of the previous transactions, brought into

communication with those who supplied the goods or those who bleached them, nor did they ever inquire, nor were they ever told, who they were.

There was no running account between the defendants and J. & O. Ryder, but the defendants almost invariably paid on each transaction. It was stated in the evidence that they generally, but "not quite always," paid in cash, that is, as already explained, on the pay day after the goods were delivered to them.

No inquiry was made on either side as to the nature of the exceptional cases in which the defendants did not pay cash. Those exceptions might have thrown light on the nature of the employment of J. & O. Ryder, or they might not.

In the present case the defendants gave a verbal order to J. & O. Ryder for bleached shirtings. Nothing was said as to the price at which they were to be procured which was therefore left to the discretion and honesty of J. & O. Ryder; and nothing was said as to the mode in which they were to be paid for, which was, therefore, to be as usual. In consequence of this order J. & O. Ryder's manager went to the plaintiff's salesman. The manager at first wished to buy for cash, but wanted discount at $2\frac{1}{2}$ per cent. Finally they agreed to split the difference, and make it $1\frac{1}{2}$ per cent. at thirty days. All this was perfectly *bonâ fide* between them, and the defendants knew nothing about it.

When the grey shirtings were delivered by the plaintiff to J. & O. Ryder they sent them to the bleacher, who, as usual, cut each piece in two; and having received from J. & O. Ryder 200 pieces of grey cloth, sent back to them 400 pieces of white cloth. Ryder & Co. sent on these 400 pieces of white cloth to the defendants, *with an invoice dated the 2nd of August, [603 headed as follows: "Invoice of ten packages of goods purchased and forwarded per carrier to Liverpool, by order and on account of Messrs. Bates, Stokes, & Co. there" (the defendants) "by the undersigned," &c. The defendants were in this invoice charged with the actual money which ought to have been paid to the plaintiff as the price of the goods, viz., 205*l.* less $1\frac{1}{2}$ per cent. discount, the actual charge of the bleaching, one per cent. on the amount of those two sums as commission, and the amount of some packing charges, making in all 227*l.* 10*s.* 9*d.*, noted as being due the 11th of August, which was the first pay-day after the goods would be received in Liverpool. On the 11th of August the defendants, with perfect *bonâ fides*, paid J. & O. Ryder that sum of 227*l.* 10*s.* 9*d.*

On this state of the evidence, Mr. Herschell took three points. First, he said that the defendants were not undisclosed principals, employing J. & O. Ryder as agents with authority to create privity between the unknown persons who supplied the goods

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and the defendants. Secondly, that even if they were, the defendants, having, before the plaintiff heard of their connection with the matter and before they heard of the plaintiff, honestly and in the ordinary course of business paid J. & O. Ryder, were no longer liable to the plaintiff. And thirdly, that the plaintiff had by laches disentitled himself to sue.

It was admitted that all that was sworn was honestly sworn, and neither counsel required anything to be left to the jury. My Brother Mellor thereupon directed a verdict for the plaintiff, with leave to move to enter a verdict for the defendants, the Court to have power to draw inferences of fact.

The third point taken was disposed of at once; but the other two points were fully discussed, and the authorities brought before us. On these we took time to consider.

The first point depends on a question of fact, viz., what was the authority really given to J. & O. Ryder by the defendants? It is, we think, too firmly established to be now questioned, that, where a person employs another to make a contract of purchase for him, he, as principal, is liable to the seller, though the seller never heard of his existence, and entered into the contract solely on the credit of the person whom he believed to be the principal 604] though in fact he was not. It has often been doubted whether it was originally right so to hold; but doubts of this kind come now too late: for we think that it is established law that, if on the failure of the person with whom alone the vendor believed himself to be contracting, the vendor discovers that in reality there is an undisclosed principal behind, he is entitled to take advantage of this unexpected godsend, and is not put to take a dividend from the estate of him to whom alone he believed himself to be contracting, and with whom alone he gave credit, and to leave the trustees of that estate to settle with the undisclosed principal, subject to all mutual credits and equities between them. He may recover the price himself direct from the principal, subject to an exception, which is not so well established as the rule, and is not very accurately defined, viz., that nothing has occurred to make it unjust that the undisclosed principal should be called upon to make the payment to the vendor.

We have first to consider whether we should draw from the evidence the inference of fact that the defendants were principals, so as to bring the case within the rule, so that if the price had not been paid by the defendants to Ryder & Co. the plaintiff would have a right to be paid the money rather than look to the trustees of the estate of J. & O. Ryder. This depends entirely on what was the real nature of the employment of J. & O. Ryder by the defendants. The defendants not being known in the matter at all to the plaintiff, there is no room for holding them

bound by any apparent authority given to J. & O. Ryder. There can be no case against the defendants of holding them out as having their authority, or clothing them with ostensible authority, to a person who did not know that J. & O. Ryder had any principal at all. As to the real authority, there is evidence both ways. The charge of commission is conclusive to show that, to some extent, there was a relation of principal and agent; the defendants were entitled to have the skill and diligence of J. & O. Ryder to get the goods as cheaply as they could; and the defendants were entitled to have the true cost of the goods debited to them with no further addition than the charges and the commission. Then Ryder & Co. did not engage to supply the goods themselves; they only undertook to find persons who would. If prices had risen after the plaintiff *made his bargain, and the plaintiff [605 had refused to go on, the now defendants could not have sued J. & O. Ryder for this; they must either have sued the now plaintiff, if there is privity between them, or perhaps have used the name of J. & O. Ryder, as their trustees, to sue, as is suggested by Kelly, C.B., in *Mollett v. Robinson* ⁽¹⁾. In the invoice the defendants are not charged as purchasers from J. & O. Ryder, but are debited for goods bought by their order and on their account. This form is also evidence in favor of the plaintiff. But none of these things are conclusive. The great inconvenience that would result if there were privity of contract established between the foreign constituents of a commission merchant and the home suppliers of the goods has led to a course of business, in consequence of which it has been long settled that a foreign constituent does not give the commission merchant any authority to pledge his credit to those from whom the commissioner buys them by his order and on his account. It is true that this was originally (and in strictness perhaps still is) a question of fact; but the inconvenience of holding that privity of contract was established between a Liverpool merchant and the grower of every bale of cotton which is forwarded to him in consequence of his order given to a commission merchant at New Orleans, or between a New York merchant and the supplier of every bale of goods purchased in consequence of an order to a London commission merchant, is so obvious and so well known, that we are justified in treating it as a matter of law, and saying that, in the absence of evidence of an express authority to that effect, the commission agent cannot pledge his foreign constituent's credit. Where the constituent is resident in England, the inconvenience is not so great, and we think that, *prima facie*, the authority is given, unless there is enough to show that it was not in fact given. It was strongly urged by

(1) Law Rep., 7 C. P., at p. 119.

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the defendants' counsel, that the course of dealing and the mode of settlement by the defendant with J. & O. Ryder were sufficient to show that J. & O. Ryder were not intended to have authority to establish privity of contract between the defendants and those from whom J. & O. Ryder obtained the goods. We agree that it is evidence that way; but we do not feel justified in finding this question in favor of the defendants. If a special jury, 606] *who have knowledge of the course of business beyond what we have, had on this ground found a verdict for the defendants, we should not have been dissatisfied with it. Indeed, we feel this so strongly that, if the event of the cause depended upon this point, we should probably have given the defendants liberty to have a new trial, on payment of costs, in order that the opinion of a jury might be taken on that new trial, when the nature of the exceptions from the general habit of paying cash might also be ascertained. But it is not necessary to do this, as we have come to the conclusion that the defendants are entitled to the verdict on the second ground.

It is right, in order to avoid misapprehension, to say that the phrase repeatedly used by the counsel for the plaintiff that the vendor has a right to follow the goods is, in our opinion, calculated to mislead. There are cases, such as that of *Wilson v. Hart* (1), to which such a phrase would be applicable; but those, as is pointed out in 2 Smith's Leading Cases, at p. 332 (5th ed.; p. 351, 6th ed.), proceed on the ground of fraud. In the absence of fraud, unless the person receiving the goods is a party to the contract under which the goods were sold, the vendor has no right to follow them. If the goods were bricks sold to a contractor he could not charge the owner of the house into which they were built, though he might do so if the person supposed to be the contractor turned out to be really agent for the owner of the house; and the principle is the same in such a case as the present.

The second point raised is of considerable importance. In *Railton v. Hodgson*, and *Peele v. Hodgson*, reported in a note to *Addison v. Gandassequi* (2), Mansfield, C.J., said, "If Hodgson" (the undisclosed principal) "had really paid Smith, Lindsay, & Co." (the insolvent actual purchasers), "it would have depended on circumstances whether he would have been liable to pay for the goods over again; if it would have been unfair to have made him liable, he would not have been so." This was in 1804. It is, however, to be observed, that as Hodgson had not paid either, this was not necessary for the decision. Two cases of *Waring v. Favenck* (3), and *Kymer v. Suwercropp* (4), which were tried before

(1) 7 Taunt., 295.

(2) 4 Taunt., 575, 577.

(3) 1 Camp., 85.

(4) 1 Camp., 109.

*Lord Ellenborough in 1807, are generally cited on this [607 subject, without, as it seems to us, paying sufficient attention to the fact that Kenyon & Co., in consequence of whose insolvency the questions arose, were London brokers, not commission merchants. A broker always professes to make a contract between two principals, and, though in recent times, the strictness of the rules has to some extent been relaxed, in 1807, a London broker was bound by his bond (the form of which will be found in Holt N. P. at p. 431, n.) to make known to the person with whom the agreement is made the name of his principal if required, and not to deal on his own account. In *Kemble v. Atkins* ⁽¹⁾, it was decided that this did not prevent the broker from making the contract in his own name so as to pledge his personal credit to the seller; but still he must necessarily have had a principal. And, as is laid down in *Higgins v. Senior* ⁽²⁾, it was always competent, notwithstanding this form of the agreement, to show who the person was for whom the broker acted as agent in making the contract, "so as to give the benefit of the contract on the one hand to, and charge with liability on the other, the unnamed principals." In every case, therefore, where the sale is to a broker, the vendor knows that there is or ought to be a principal between whom and himself there is established a privity of contract, and whose security he has in addition to that of the broker, and the principal also knows that the vendor is aware of this and to some extent trusts to his liability. This is, therefore, a very different kind of case from that of a person selling goods to a person whom at the time of the contract he supposes to be a principal. The marginal note in *Kymer v. Suwercropp* ⁽³⁾, is, perhaps, too general, even in the case of a broker, as is pointed out by Maule, J., in *Smyth v. Anderson* ⁽⁴⁾; but what was actually decided was probably right.

The next case in order of date is *Thomson v. Davenport* ⁽⁵⁾, where Lord Tenderden, in speaking of this subject, says: "I take it to be a general rule, that if a person sells goods supposing, that at the time of the contract he is dealing with a principal, but afterwards discovers that the person with whom [608 he has been dealing is not the principal in the transaction, but agent for a third person, though he may in the mean time have debited the agent with it, he may afterwards recover the amount from the real principal; subject, however, to this qualification, that the state of the account between the principal and the agent is not altered to the prejudice of the principal." And Bayley, J., says: "Where a purchase is made by an agent, the agent does not of necessity

⁽¹⁾ Holt N. P., 427.

⁽²⁾ 8 M. & W., at p. 844.

⁽³⁾ 1 Camp., 109.

⁽⁴⁾ 7 C. B., at p. 39; 18 L. J. (C.P.) at p. 114.

⁽⁵⁾ 9 B. & C., at pp. 83, 83.

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so contract as to make himself personally liable; but he *may* do so. If he does make himself personally liable, it does not follow that the principal may not be liable also, subject to this qualification that *the principal shall not be prejudiced by being made personally liable, if the justice of the case is that he should not be personally liable.* If the principal has paid the agent, or if the state of the accounts between the agent here and the principal would make it unjust that the seller should call on the principal, the fact of payment, or such a state of accounts, would be an answer to the action brought by the seller where he had looked to the responsibility of the agent."

In this case, as in *Railton v. Hodgson* ⁽¹⁾, the freshly-discovered principal had not paid any one, and therefore the two passages above in italics were no necessary part of the decision, though they are weighty authorities as indicating the decided opinion of two judges of great experience in commercial cases.

In *Smyth v. Anderson* ⁽²⁾ the case arose in such a peculiar way that it is difficult to say exactly what was decided. But Maule, J., in his very elaborate and able judgment, expresses a decided opinion that the dicta of Chief Justice Mansfield and Bayley, J. (he seems not to have noticed that of Lord Tenterden), "affords a sensible rule on the subject." The latter dictum of Maule, J., adds very greatly to the weight of those which preceded. Still, there is no actual decision on the point.

On the other hand, it is stated in a note to the third edition of Paley's principal and agent, p. 249 n., that Mr. Justice James Parke was amongst those who did not acquiesce in the decision in *Thomson v. Davenport* ⁽³⁾. It is not said on what authority that [609] *statement proceeds, and from the context it would seem that his dissent was rather from the extension of the rule by which the principal might be charged than from the exceptions to that rule. But in *Herald v. Kenworth* ⁽⁴⁾ he does, as it seems to us, express dissent from the exceptions. The case itself arose on a demurrer to a plea which is set out. But then it is stated that the Court thought it might amount to the general issue, and therefore it was amended, but the report does not state what the amendments were. It is not easy, therefore, to say what was the actual decision. It does not, however, appear that in any part of the plea it was stated that the plaintiff was ignorant of the existence of the defendant as principal till after the defendant had paid the agent, nor even that the defendant believed such to be the case. Unless the plea was such as to raise the very point, the opinion of Parke, B. (like those of Mansfield, C.J., Bayley, J., and Maule, J.), is but a dictum entitled to high respect as an authority, but not binding as a decision. Parke,

⁽¹⁾ 4 Taunt. at p. 576. n.

⁽²⁾ 9 B. & C. 78.

⁽³⁾ 7 C. B., 21. 36; 18 L. J. (C.P.), 109, 113.

⁽⁴⁾ 10 Ex., 729, 715; 24 L. J. (Ex.) 76, 77.

B., lays down generally that "if a person orders an agent to make a purchase for him, he is bound to see that the agent pays the debt; and the giving the agent money for that purpose does not amount to payment, unless the agent pays it accordingly." After commenting on several of the cases already referred to, he concludes: "I think that there is no authority for saying that a payment made to the agent precludes the seller from recovering from the principal, unless it appears that he has induced the principal to believe that a settlement has been made with the agent." He states this as generally true wherever a principal has allowed himself to be made a party to a contract, and makes no exception as to the case where the other side made the contract with the agent believing him to be principal, and continued in such belief till after the payment was made. He certainly does not in terms say that there is no qualification of the principle he lays down when applicable to such a case; but recollecting how careful Parke B., always was to lay down what he thought to be the law fully and with accuracy, we think the counsel for the plaintiff were justified in arguing that Parke, B., thought the exception did not exist. And this is, in our opinion, a weighty authority in favor of the plaintiff's contention, more especially *as Pollock, C.B., assents in his [610 judgment to the remark thrown out by Parke, B.; during the argument, and afterwards more elaborately stated by him in his judgment. And Alderson, B., in his judgment, appears entirely to assent to the judgment of Parke, B.

We think that we could not, without straining the evidence, hold in this case that the plaintiff had induced the defendants to believe that he (the plaintiff) had settled with J. & O. Ryder at the time when the defendants paid them.

This makes it necessary to determine whether we agree in what we think was the opinion of Parke, B., acquiesced in by Pollock, C.B., and Alderson, B.

We think that, if the rigid rule thus laid down were to be applied to those who were only discovered to be principals after they had fairly paid the price to those whom the vendor believed to be the principals, and to whom alone the vendor gave credit, it would produce intolerable hardship. It may be said, perhaps truly, this is the consequence of that which might originally have been a mistake, in allowing the vendor to have recourse at all against one to whom he never gave credit, and that we ought not to establish an illogical exception in order to cure a fault in a rule. But we find an exception (more or less extensively expressed) always mentioned in the very cases that lay down the rule; and without deciding anything as to the case of a broker who avowedly acts for a principal (though not necessarily

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named), and confining ourselves to the present case, which is one in which, to borrow Lord Tenterden's phrase in *Thompson v. Davenport* (¹), the plaintiff sold the goods to Ryder & Co., "supposing at the time of the contract he was dealing with a principal," we think such an exception is established.

We wish to be understood as expressing no opinion as to what would have been the effect of the state of the accounts between the parties if J. & O. Ryder had been indebted to the defendants on a separate account, so as to give rise to a set-off or mutual credit between them. We confine our decision to the case where the defendants, after the contract was made, and in consequence of it, bona fide and without moral blame, paid J. & O. 611] Ryder at a *time when the plaintiff still gave credit to J. & O. Ryder, and knew of no one else. We think that after that it was too late for the plaintiff to come upon the defendants.

On this ground we make the rule absolute to enter the verdict for the defendants.

Rule absolute.

Attorneys for plaintiff: *Phelps & Sulgwick, for Sale, Shipman, & Sedden, Liverpool.*

Attorneys for Defendants: *Field, Roscoe, & Co., for Bateson & Co., Liverpool.*

(¹) 9 B. & C., at p. 86.

Although an undisclosed principal may be sued, yet if the credit be given to the agent his note taken for payment and a compromise be subsequently made with him, the principal is not liable, *McMonnies v. MacKay*, 39 Barb., 561.

Although if the agent do not pay or the principal have not in good faith paid the agent, he may be proceeded against. *Calder v. Dobill*, Law Rep., 6 C.

P., 486; see *Story on Agency*, § 163a.

And so where the principal authorizes his agent to pledge his credit, the principal is not discharged by payment to the agent, if the money, is not paid over to the creditor, unless the latter by his conduct makes it unjust that the principal should be sued, *Heald v. Kenworthy*, 10 Excheq., 739.

July 6.

MORGAN V. STEBLE and another.

[Law Reports, 7 Queen's Bench, 611.]

Action — Bankruptcy — Pecuniary Loss.

Declaration against defendants for a breach of duty as attorneys in not getting the best price for the equity of redemption in premises of plaintiff intrusted to defendants for sale. The defendants well knew that if plaintiff did not obtain a reasonable price, the bankruptcy of plaintiff would be the necessary and inevitable consequence, and that in consequence of defendants' breach of duty plaintiff was adjudged a bankrupt. Plea: the bankruptcy of plaintiff under the Act of 1869, and that the causes of action passed to the assignee. On demurrer:

Held, by Blackburn, Mellor, and Lush, JJ., on the authority of *Hodgson v. Sidney* (Law Rep., 1 Ex., 313), that bankruptcy was a good defence, and that the averment that defendants knew that bankruptcy would ensue made no difference. Hannen, J., doubting whether *Hodgson v. Sidney* was not distinguishable on that ground.

DECLARATION that defendants were attorneys and solicitors carrying on business in co-partnership, and plaintiff was entitled to and interested in an estate in fee simple in possession in certain lands, premises, and buildings in the borough of Liverpool, subject to mortgages thereon, and plaintiff was also possessed of or interested in certain plant and machinery upon the said premises. And plaintiff was desirous of selling the said mortgaged premises and his interest and equity of redemption in respect of the same and the said plant and machinery. And plaintiff, at the request of the defendants, retained and employed them as such attorneys and solicitors to use due endeavors to obtain and procure a purchaser for the said estate and premises and the said plant and machinery, and to sell the same for the best price, for reasonable *reward to defendants in that [612] behalf, and defendants then well knew that if the plaintiff did not obtain a reasonable and adequate price for the said estate and premises the bankruptcy of the plaintiff would be the necessary and inevitable consequence. Yet defendants, not regarding their duty as such attorneys and solicitors under the retainer, and contriving and intending to injure the plaintiff, falsely, fraudulently, and deceitfully represented to the plaintiff that no greater price or sum than 100*l.* could be obtained on the sale of the said estate and premises and the said plant and machinery, whereas in truth and in fact a much greater price or sum could and might have been obtained for the same, and whereas in truth and in fact the person who ultimately became the purchaser had offered and was ready and willing to give a much greater price than 100*l.*, as defendants then well knew. And defendants, further disregarding their said duty, falsely, fraudulently, and deceitfully represented to plaintiff that the person who had offered a sum of 300*l.* for the said estate was another and a different person from the person who ultimately became the purchaser, whereas in truth and in fact it was one and the same person as defendants then well knew. And the defendants, further disregarding their duty, and in violation of good faith, voluntarily and unnecessarily divulged and communicated to the person who ultimately became the purchaser, whilst such person was in treaty for the purchase, that plaintiff was in embarrassed circumstances and was under an imperative and urgent necessity of selling the said estate, &c. And defendants wrongfully, fraudulently, and deceitfully prevented the said purchaser from giving a much greater price than 100*l.*, although the purchaser was ready and willing to give a much greater price, as defendants then well knew. And defendants, further disregarding their said duty, wrongfully, deceitfully, and corruptly during the treaty for the said sale, and before the completion

thereof, entered into an agreement with the person who ultimately became the purchaser for the division between him and defendants of any profits that might accrue from the purchase and resale. By means of which breaches of duty, and of the false, fraudulent, and deceitful conduct of defendants, plaintiff was compelled to sell, and did sell, the said estate and premises and the said plant and machinery for a wholly inadequate price, **613**] and for a much *smaller price or sum than he otherwise might and would have obtained for the same. And plaintiff was forced and compelled to become, and did become, and was adjudicated a bankrupt, solely in consequence of the said breaches of duty and of the said false, fraudulent, and deceitful conduct of defendants. And the plaintiff also sustained great loss and suffered great trouble of mind and body and great personal annoyance, and was greatly injured in character and credit.

Plea, that after the accruing of the alleged causes of action, and before the coming into operation of the bankruptcy act, 1869, and before this suit, plaintiff became, and was duly adjudged bankrupt, under the statutes then in force, and thereupon an official assignee of his estate and effects was duly appointed, &c., and the estate of the plaintiff, including the alleged causes of action in the declaration mentioned, before and at the time of the commencement of this suit, vested in the assignee.

Demurrer and joinder.

May 9. *Torr*, Q.C. (*W. H. Butler* with him), for the plaintiff contended that the being adjudged a bankrupt was a personal damage to the plaintiff, which would not pass to the assignee, although pecuniary loss were involved. He cited *Rogers v. Spence* ⁽¹⁾; *Beckham v. Drake* ⁽²⁾; *Wetherell v. Julius* ⁽³⁾; *Brewer v. Drew* ⁽⁴⁾; and distinguished *Hodgson v. Sidney* ⁽⁵⁾, on the ground that the bankruptcy itself was the wrong done by the defendants, inasmuch as it was alleged in the declaration that they knew that bankruptcy would be the consequence if the plaintiff did not get an adequate price for his equity of redemption.

R. G. Williams (*C. Russell*, Q.C., with him), for the defendants, relied on *Hodgson v. Sidney* ⁽⁵⁾ as directly in point. Bramwell, B., said the special damage of bankruptcy is only a consequence of the primary damage, and therefore not a separate course of action: see *Beckham v. Drake* ⁽⁶⁾.

Torr, Q.C., in reply.

Cur. adv. vult.

614] *July 6. The judgment of Blackburn, Mellor, and Lush, JJ., was delivered by

BLACKBURN, J. (7). In this case the question raised on demur-

⁽¹⁾ 12 Cl. & F., 700, 720.

⁽²⁾ 10 C. B., 267.

⁽³⁾ Law Rep., Ex., 313.

⁽⁴⁾ 2 H. L. C., 579, 597, 642.

⁽⁵⁾ 11 M. & W., 625.

⁽⁶⁾ 2 H. L. C., 579.

⁽⁷⁾ The judgment was read by Mellor, J.

rer is, whether the plea of bankruptcy amounts to a good defence, the cause of action, viz., a failure to procure the best price for the equity of redemption of the plaintiff's premises entrusted to the defendants for sale, being one which undoubtedly would pass to the assignees. But it being alleged, as special damage, that "the defendants well knew that if the plaintiff did not obtain a reasonable price, the bankruptcy of the plaintiff would be the necessary and inevitable consequence," and further, "that in consequence of the breach of duty alleged, the plaintiff was in fact adjudicated a bankrupt" (this special damage being such as would not pass to the assignees), the question is, whether, under these circumstances, the plea of bankruptcy is an answer.

The case of *Hodgson v. Sidney* (1) is expressly in point against the plaintiff, unless the averment of the defendants' knowledge makes a difference. We think that it does not. The averment is not traversable. The fact of knowledge, if it existed, might have been proved as well under the declaration in *Hodgson v. Sidney* (1) as under the present declaration; and on the demurrer in that case all that was necessary to be proved in order to sustain the cause of action must have been taken as admitted.

We therefore give judgment for the defendants, leaving the plaintiff, if so advised, to question the decision of *Hodgson v. Sidney* (1) in a court of error.

HANNEN, J. I entertain some doubt whether the judgment in *Hodgson v. Sidney* (1) necessarily involves the decision of the question raised by this case. The averment contained in this declaration, that the defendants knew that the plaintiff's bankruptcy would be the "necessary and inevitable consequence" of the wrongful acts complained of, whether traversable or not, is required in order to show the legal connection between the defendants' tortious conduct and the resulting damage which would otherwise be too remote. No such averment was contained in the declaration in *Hodgson v. Sidney* (1). Having regard to this distinction, and to the fact that the point [615 now raised was not presented to the minds of the judges in the Court of Exchequer, I should have felt myself at liberty to consider the question as one not concluded by authority, but for the opinion of the other members of this Court. The view they take of the effect of the judgment in *Hodgson v. Sidney* (1) makes it necessary that the plaintiff, if advised to prosecute his claim, should bring that decision under the consideration of a Court of Error.

Judgment for the defendants (2).

Attorneys for plaintiff: *Chinery & Aldridge*.

Attorneys for defendants: *Cunliffe & Beaumont*.

(1) Law Rep., 1 Ex. 313. (2) See *Crauford v. Cinnamon*, Ir. L. Rep., 1 C. L., 325

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*[IN THE EXCHEQUER CHAMBER.]

FOWLER and others v. HOLLINS and others.

[Law Reports, 7 Queen's Bench 616.]

Trover — Conversion — Broker.

The plaintiff sued the defendants, cotton brokers, in an action of trover, to recover the value of thirteen bales of cotton. The cotton was fraudulently bought by B. from the plaintiffs' brokers; the defendants, without notice of any fraud, bought, in their own name as principals, the cotton from B. and afterwards sold it to M. at the same price at which they had bought it, charging a commission. The defendants obtained B.'s signature to a delivery order, and took delivery of it from B.'s warehouse and conveyed it to a railway station, whence it was forwarded to M., by whom it was spun into yarn. The defendants in buying the cotton intended to act as brokers, believing the cotton would suit M. Afterwards the plaintiffs demanded the cotton from the defendants. The jury found that the cotton was bought by the defendants as agents in the course of their business as brokers, and that they dealt with it only as agents to their principal:

Held, by Martin, Channel, and Cleasby, BB., affirming the judgment of the Queen's Bench, that the defendants were liable to the plaintiffs in trover for the value of the cotton; Kelly, C.B., Byles and Brett, JJ., dissenting.

By Martin and Channel, BB., that the defendants having bought the cotton as principals from B., it was immaterial that they intended to deal with it only as agents to their principal; and that whoever deals wrongfully with the goods of another is equally liable whether he be agent or principal.

By Cleasby, B., that by reason of the real principals not being known, and therefore not disclosed at the time the bargain was made, the defendants necessarily became the parties to the contract until the real principals being ascertained were adopted by the sellers, and by their dealing with the cotton became liable for a conversion.

By Kelly, C.B., and Byles, J., that the defendants were not guilty of a conversion, inasmuch as they acted only as brokers, and exercised no dominion over the cotton in their own right and for their own benefit.

By Brett, J., that a possession or detention, which is a mere custody or mere appropriation made without reference to the question of the property in chattels, is not a conversion, and that the defendants, acting only as brokers by negotiating a bargain of purchase and sale and by passing a delivery order, were not guilty of a conversion.

APPEAL from the decision of the Court of Queen's Bench making a rule absolute to enter a verdict for the plaintiffs.

The action was in a trover to recover thirteen bales of cotton.

Pleas, not guilty, and not possessed.

The cause was tried before Willes, J., at the Liverpool Spring Assizes, 1870.

1. The plaintiffs are merchants carrying on business at Liverpool, and the defendants are cotton brokers at that place.

617] *2. Early in December, 1869, the plaintiffs instructed their brokers, Messrs. Rew & Freeman, to sell for them thirteen bales of cotton, and shortly before the 18th of December a person named Hill, a clerk in the service of H. K. Bayley, came to the brokers of the plaintiffs and offered to purchase the cotton. The plaintiffs' brokers, however, refused to sell unless the name of a responsible person were given as purchaser. Hill

thereupon stated that H. K. Bayley was buying as broker for Thomas Seddon, of Bolton.

3. The plaintiffs' brokers, having made inquiries as to Thomas Seddon, agreed to sell the thirteen bales of cotton to him.

4. Accordingly, on the 18th of December, 1869, the plaintiffs' brokers forwarded to the plaintiffs a sold note "for thirteen bales American cotton, ex *Minnesota*, at 12*d.* per lb. — buyer, Thomas Seddon, per H. K. Bayley — payment in cash within ten days less one and a half per cent. discount." The plaintiffs' brokers also sent to Bayley a bought note addressed to "Thomas Seddon, per H. K. Bayley, for thirteen bales American cotton, ex *Minnesota*, at 12*d.* per lb., subject to the rules and regulations of the Liverpool Cotton Brokers' Association. Payment in cash within ten days less one and a half per cent. discount."

5. On the same day Bayley sent to plaintiffs' brokers a sampling and delivery order for the "thirteen bales cotton, ex *Minnesota*, bought this day for Thos. Seddon, at 12*d.*"

6. Bayley accordingly obtained, on the same day, delivery of the goods, and they were removed to his warehouse.

7. H. K. Bayley had no authority from Thomas Seddon to buy for him, but the plaintiffs did not discover this until the time and in the manner mentioned in the 18th paragraph of this case.

8. On the 23d of December H. K. Bayley saw the defendant Francis Hollins, and showed him some samples of cotton, ex *Minnesota*. F. Hollins offered to give 11½*d.* per lb. for the thirteen bales, and the defendant then stated that he would send in the name of his principal in the course of the day. He also bought in like manner, on the same day, other twenty-five bales of cotton from Bayley. Immediately after the agreement to buy, Bayley handed to the defendants the following memorandum: "We sell you 13 B's. 11½, 25 B's. 11½. Cash to day, per H. K. B. & Co."

*9. The defendants proceeded to sample the cotton. [618 For this purpose they sent to Bayley the following note: "Liverpool, 23d December, 1869. Please allow the bearer to sample 13 bales cotton ex *Minnesota* @ 11½ per lb. bought this day." This note Bayley indorsed with the requisite authority to his warehousemen, and the defendants' servants at once sampled the cotton.

10. The defendants, on the morning of the 23d of December, had received a message from Micholls, Lucas & Co., cotton spinners at Stockport, for whom the defendants were in the habit of purchasing cotton, stating that they were coming over to Liverpool on the 23d of December to purchase cotton through the

defendants. The defendants had had no other communication with Micholls & Co., as to the buying for them on this day of this or any cotton.

11. The cotton which the defendants bought of H. K. Bayley was such cotton as the defendants were in the habit of buying for Micholls, Lucas, & Co., and at the time the defendant F. Hollins agreed to purchase the cotton from Bayley he intended to buy it as a broker and intended it for Micholls & Co., believing that it was such cotton as they were coming to buy and that it would suit them, and that on their arrival at Liverpool they would take it.

12. About half an hour after the defendants had agreed with Bayley, Mr. Micholls came to the defendants' office, and samples of the cotton having been obtained, he examined them to judge of the quality of the cotton, he inquired as to the quantity and price, and being satisfied as to these he agreed to take it.

13. The defendants have a large number of customers, and frequently, without any definite instructions, buy cotton which they, knowing their trade and requirements, believe will suit them, and feeling satisfied they will take it; but if it happens that a customer for whom they intended to buy such cotton will not take it, they trust to be able to place it with some other customer.

14. Later in the same day the defendants sent to Bayley a delivery order for the delivery to bearer of the "thirteen bales of cotton, ex *Minnesota*, at 11½ per lb. bought for Micholls, Lucas, & Co." This order was crossed "To Joseph Thompson, H. K. Bayley, per R. Hill," and indorsed "Delivered the within thirteen bales, Joseph Thompson." This was the first document which 619] mentioned *Micholls, Lucas, & Co.'s names to H. K. Bayley. Bayley also sent in on the same day to the defendants an invoice addressed "Francis Hollins & Co. Bought from H. K. Bayley thirteen bales of cotton, ex *Caledonia*, at 11½ per lb., amounting to 244*l.* 19*s.* 8*d.*"

15. This delivery order was taken to the warehouse of H. K. Bayley by one of the defendants' clerks, and thirteen bales of cotton were under the supervision of the defendants' clerks delivered by Bayley's warehouseman into the cart of a carter employed by the defendants. The cotton was conveyed in the cart to the railway station, whence it was forwarded to Micholls, Lucas, & Co.'s mill at Stockport.

16. These thirteen bales were the thirteen bales obtained by H. K. Bayley from the plaintiffs as mentioned in par. 6.

17. The invoice price of the cotton, 244*l.* 19*s.* 8*d.*, was paid by the defendants to H. K. Bayley, and the same sum, with 1*l.* 4*s.* 10*d.* added for the defendants' commission, and 6*s.* 6*d.* for por-

terage, was paid by Micholls, Lucas, & Co. to the defendants. The defendants' course of business is to charge their customers 6*d.* per bale for cartage or portorage. The carter carrying for the defendants on certain agreed terms — the 6*s.* 6*d.* mentioned represents the 6*d.* per bale on the thirteen bales.

18. The plaintiffs not having been paid for the cotton in due time, their brokers applied to Thomas Seddon for a settlement, and were informed by him, as the fact was, that he had never authorized H. K. Bayley to purchase cotton for him.

19. They thereupon made inquiries, and learnt that the cotton had been sold and delivered by H. K. Bayley to the defendants. A demand (stating the fraudulent nature of Bayley's transaction) was made on the 10th of January, 1870, by the plaintiffs' attorneys on the defendants for the cotton.

20. This was the first intimation which the defendants received that the cotton was not, as they believed it to be, the property of Bayley. They replied to the demand of the plaintiffs' attorneys as follows: "the cotton was bought by one of our spinners, Messrs. Micholls, Lucas, & Co., for cash, and has been made into yarn long ago; and as everything is settled up, we regret we cannot render your clients any assistance."

Upon these facts, the learned judge left to the jury the questions, *whether the thirteen bales were bought by the [620] defendants as agents in the course of their business as brokers, and whether they dealt with the goods only as agents to their principals.

The jury found a verdict for the defendants; the learned judge reserved leave to the plaintiffs to move to enter the verdict for them for the value of the thirteen bales.

A rule was afterwards obtained pursuant to the leave reserved⁽¹⁾.

A rule was argued on the 21st and 26th of November, 1871, and the Court (Mellor, Lush, and Hannen, JJ.), made it absolute, on the ground that the defendants, in effect, bought as principals, and would have been liable to Bayley as vendees, and having dealt with the cotton as if the property were in them by assigning it to Micholls, Lucas & Co., were liable to the plaintiff-

(1) The terms of the leave reserved did not appear in the statement of the case for the Court of Appeal; but it was reserved in writing and was handed to the Court, and was as follows: If the defendants, having acted throughout honestly, in the ordinary course of business, having bought and paid for the cotton only as agents for Micholls, Lucas, & Co., and having dealt with the goods only as agents to forward them, were answerable for the value of

the thirteen bales of cotton as having converted them to their own use. The defendants to be at liberty to argue, if necessary, that the sale by Bayley under the circumstances gave a good title to a bona fide purchaser for value without notice.

The rule was moved on three grounds: 1. That the verdict was against the evidence. 2. Misdirection. 3. On the point reserved. The Court refused the rule on the first and second grounds.

iffs for a conversion, on its turning out that no property had passed from the plaintiffs to Bayley. The case of *Greenway v. Fisher* ⁽¹⁾ did not apply, and the case was not distinguishable in principle from *Hardman v. Booth* ⁽²⁾.

Feb. 14. *Holker*, Q.C. (*Herschell*, Q.C., with him), for the defendants, contended, first, that the defendants, having purchased the goods in the name of undisclosed principals, Messrs. Micholls, who had afterwards ratified the contract, the property in the goods passed to them; and the action ought to have been against Messrs. Micholls: *Foster v. Bates* ⁽³⁾; *Bird v. Brown* ⁽⁴⁾. Secondly, that the defendants, having acted merely as brokers in negotiating the sale, their acts did not amount to a conversion. On this point, in addition to the cases mentioned in the judgment, they cited *Pillott v. Wilkinson* ⁽⁵⁾; *Hald v. Carey* ⁽⁶⁾; *Greenway v. Fisher* ⁽¹⁾.

Kay, Q.C. (*C. Russell*, Q.C., with him), for the plaintiffs, contended, first, that the defendants purchased the cotton from Bayley as principals, and not as agents. Secondly, assuming they purchased as agents, that the asportation of the cotton by the defendants, for their own or for the use of a third person, amounted to a conversion: *Bac. Abr. Trover* (B.); *Baldwin v. Cole* ⁽⁷⁾; *McCombie v. Davies* ⁽⁸⁾; *Higgonson v. Burton* ⁽⁹⁾; *Hardman v. Booth* ⁽¹⁰⁾. Thirdly, that every intermeddling with the property of another, with the intention to exercise dominion over it, was a conversion, and the acts of brokers, agents, or servants were not exemptions from this rule: *Story on Agency*, ss. 308, 309; *Perkins v. Smith* ⁽¹¹⁾; *Cranch v. White* ⁽¹²⁾; *Tinkler v. Poole* ⁽¹³⁾; *Hardman v. Booth* ⁽¹⁴⁾; but that it is otherwise in the case of carriers and wharfingers: *Ross v. Johnson* ⁽¹⁵⁾; *Lee v. Bayes* ⁽¹⁶⁾.

Cur. adv. vult.

June 14. The following judgments were delivered:

BRETT, J. In this case the plaintiffs, merchants in Liverpool, sued the defendants, cotton brokers in the same place, in an action of trover to recover the value of thirteen bales of cotton. The cotton had, under the circumstances set forth in the case on appeal, been in 1869 fraudulently bought by one Hill, a clerk of Bayley, a cotton broker, from the plaintiffs' brokers, Messrs. Rew & Freeman. The defendants, in 1869, bought, under the circumstances further stated in the case, and without notice of

⁽¹⁾ 1 C. & P., 190.

⁽²⁾ 1 H. & C., 803; 32 L. J. (Ex.), 105.

⁽³⁾ 12 M. & W., 226.

⁽⁴⁾ 4 Ex., 786.

⁽⁵⁾ 3 H. & C., 345; 34 L. J. (Ex.), 22.

⁽⁶⁾ 11 C. B., 977; 21 L. J. (C. P.), 97.

⁽⁷⁾ 1 C. & P., 190.

⁽⁸⁾ 6 Mod., 213.

⁽⁹⁾ 6 East., 538.

⁽¹⁰⁾ 26 L. J. (Ex.), 342.

⁽¹¹⁾ 1 H. & C., 803; 32 L. J. (Ex.), 105.

⁽¹²⁾ 1 Wils., 328.

⁽¹³⁾ 1 Bing. N. C., 414.

⁽¹⁴⁾ 5 Burr., 2657.

⁽¹⁵⁾ 5 Burr., 2825.

⁽¹⁶⁾ 18 C. B., 599; 25 L. J. (C. P.), 249.

any fraud, the same cotton from Bayley, and obtained his signature to a delivery order for it, and took delivery of it from Bayley's warehouse into the cart of a carter employed by them, and conveyed it in the cart to the railway station, whence it was forwarded to Messrs. Micholls, Lucas, & Co.'s mill at Stockport, where it was *spun into yarn by them. In 1870, after the [622 cotton had been so used by Messrs. Micholls, Lucas, & Co., the plaintiffs demanded the cotton from the defendants. The learned judge, Mr. Justice Willes, before whom the case was tried, left to the jury the questions, whether the thirteen bales were bought by the defendants as agents in the course of their business as brokers, and whether they dealt with the goods only as agents to their principals. The jury found a verdict for the defendants. The learned judge reserved leave to the plaintiffs to enter a verdict for 244*l.* 19*s.* 8*d.*, the value of the cotton, if the defendants, having acted throughout honestly, in the ordinary course of business, having bought and paid for the cotton only as agents for Micholls, Lucas, & Co., and having dealt with the goods only as agents to forward them, were answerable for the value of the thirteen bales of cotton, as having converted them to their own use. The defendants to be at liberty to argue, if necessary, that the sale by Bayley, under the circumstances, gave a good title to a bona fide purchaser for value without notice. An application was made to the Court of Queen's Bench to set aside the verdict as being against evidence, and to enter the verdict for the plaintiffs in pursuance of the leave reserved. The rule to set aside the verdict was refused; but a rule to enter the verdict for the plaintiffs was granted, and afterwards made absolute.

According to the interpretation put upon the findings of the jury by the leave reserved, assented to by both parties, it must be taken, I think, that the defendants in making the contract and paying the contract price, acted only as brokers and agents for Micholls, Lucas, & Co., and that, in obtaining the signature to the delivery order and in forwarding the goods to the railway station, they acted only as forwarding agents to forward goods to their principals. Upon the leave reserved, it appears to me that neither was the Court below nor is this Court at liberty to enter upon any other interpretation of the facts proved at the trial. If any other complexion is to be given to facts proved at a trial *ut nisi prius* than that put upon them by the judge in the leave which he reserves, parties will not consent to that valuable mode of raising and determining questions of law. The question then is whether, if this interpretation be accepted, the defendants have been, in *point of law, guilty of a conversion of the [623 plaintiffs' goods so as to be liable in an action of trover. It seems necessary, in the first place, to consider and analyze the

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real import of the findings of the jury. They have first found, then, that the defendants acted *only* as brokers. It seems desirable, in order to appreciate that finding, to consider the mercantile characteristics and thereupon the legal duties and liabilities of such an agent. The true definition of a broker seems to be, that he is an agent employed to make bargains and contracts between other persons in matters of trade, commerce, or navigation. Properly speaking, a broker is a mere negotiator between the other parties. If the contract which the broker makes between the parties be a contract of purchase and sale the property in the goods, even if they belong to the supposed seller, may or may not pass by the contract. The property may pass by the contract at once, or may not pass until a subsequent appropriation of goods has been made by the seller and has been assented to by the buyer. Whatever may be the effect of the contract as between the principals, in either case no effect goes out of the broker. If he signs the contract, his signature has no effect as his; but only because it is in contemplation of law the signature of one or both of the principals; no effect passes out of the broker to change the property in the goods. The property changes either by a contract which is not his, or by an appropriation and assent, neither of which is his. In modern times, in England, the broker has undertaken a further duty with regard to the contract of purchase and sale of goods. If the goods be in existence, the broker frequently passes a delivery order to the vendor to be signed, and on its being signed, he passes it to the vendee. In so doing he still does no more than act as a mere intervener between the principals. He himself, considered as only a broker, has no possession of the goods, no power actual or legal of determining the destination of the goods, no power or authority to determine whether the goods belong to buyer or seller or either; no powers, legal or actual, to determine whether the goods shall be delivered to the one or be kept by the other. He is throughout merely the negotiator between the parties. And, therefore, by the civil law, brokers "were not treated as ordinarily incurring any personal liability 624] by their *intervention, unless there was some fraud on their part." Story on Agency, s. 30. And if all a broker has done be what I have hitherto described, I apprehend it to be clear that he would have incurred no personal liability to any one according to English law. He could not be sued by either party to the contract for any breach of it. He could not sue any one in any action in which it was necessary to assert that he was the owner of the goods. He is dealing only with the making of a contract, which may or may not be fulfilled, and making himself the intermediary passer on or carrier of a docu-

ment, which may or may not be obeyed, without any liability thereby attaching to him towards either party to the contract. He is, so long as he acts only as a broker in the way described, claiming no property in or use of the goods, or even possession of them, either on his behalf or on behalf of any one else. Obedience or disobedience to the contract, and its effect upon the goods, are matters entirely dependent upon the will and conduct of one or both of the principals, and in no way within his cognizance. Under such circumstances, and so far, it seems to me clear that a broker cannot be sued with effect by any one. If goods have been delivered under a contract so made and a delivery order so passed, still he has had no power, actual or legal, of control either as to the delivery or non-delivery, and probably no knowledge of the delivery, and he has not had possession of the goods. It seems to me impossible to say that for such a delivery he could be held liable by a real owner of the goods as for a wrongful conversion to his, the broker's, own use. But then in some cases a broker, although acting as an agent for a principal, makes the contract of purchase and sale in his own name. In such case he may be sued by the party with whom he has made such contract for a non-fulfilment of it. But so also may his undisclosed principal. And although the agent may be liable upon the contract, yet I apprehend nothing passes to him by the contract. The goods did not become his. He could not hold them, even if they were delivered to him, as against his principal. He could not, as it seems to me, in the absence of anything to give him a special property in them, maintain any action in which it was necessary to assert that he was the owner of the goods. The goods would be the property of his principal. And although *two persons, it is said, may be liable on the same con- [625 tract, each as sole contractor, yet it is impossible that two persons can each be the sole owner of the same goods; although the agent may be held liable as a contractor, on the contract, he is still only an agent and has acted only as an agent. He could not be sued, as it seems to me, merely because he had made the contract of purchase and sale in his own name with the vendor, even though the contract should be in a form which passes property in goods by the contract itself,—by a third person, as if he, the broker, were the owner of the goods. As, for instance, if the goods were a nuisance or were an obstruction, or, as it were, trespassing, he would successfully answer such an action by alleging that he was not the owner of the goods, and by proving that they were the goods of his principal, until then undisclosed. If he could not be sued for any other tort, merely on the ground that he made the contract in his own name with the vendor, it seems to me that he cannot be successfully sued

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merely on that ground by the real owner of the goods, as for a wrongful conversion of the goods to his own use. It may be well here to notice that in the present case the broker, although he did not give the name of his principal at the time of the bargain, expressly reserved the right of naming his principal in the course of the day, and that he did so. It may be well said, therefore, that in this case he did disclose his principal. But however that may be, if all that the defendants had done in this case was to make the contract and pass the delivery order, I should have thought it clear that they would not have been guilty of a conversion of the goods in question. But the defendants in this case did more; they, through an agent of theirs, took actual possession of the goods and carried them from the warehouse to the railway station in order to forward them to Messrs. Micholls, Lucas, & Co. A question arises as to what was the nature of that asportation. Such an act might have been done with an actual intention of depriving one person of his property in the goods and of vesting the property in them in the other; as for instance, if the defendants had had notice of the plaintiff's claim, and had passed the goods on to the principals in the contract after such notice. In such case they would clearly be guilty of a conversion. But the jury have found that 626] they have dealt with the goods *only as agents for their principals. And the judge who tried the cause has by the form of the leave reserved, fixed the meaning of that to be that the defendants acted only as agents to forward. That must mean, as it seems to me, that they forwarded the goods without any actual intention with regard to, or any consideration of, the property in the goods being in one person more than another. The real question in this case is whether such a possession of the goods, and such an asportation put any liability on the defendants different from their liabilities, if any, by reason of having, as brokers, made the contract and passed the delivery order. The question depends upon what is the legal definition of the term "conversion" in an action of trover. The leading authority is the note in Williams's Saunders, to the case of *Wilbraham v. Snow* ⁽¹⁾. As in all other questions arising upon the application of legal principles to facts, there are some cases about which there is no doubt. Where one, with intent to make them his own, actually takes as his own, or actually destroys or actually uses as a man uses his own, the goods of another, it is not difficult to determine that he has done an act intentionally inconsistent with the dominion of any one but himself as real owner of the goods, and has been guilty of a wrongful conversion of the goods. It is easy to understand how it was held that in such

⁽¹⁾ 2 Wms. Saund., 47-d.

cases the innocence of the defendant, in the sense of his not knowing who the real owner was, or that the person from whom he immediately took the goods, was not the real owner, was immaterial; the defendant has taken the goods with intent that they should be his own, or has used them as if they were his own. Such acts must necessarily be contrary to the rights of a real owner who has not authorized him so to take or so to use. So if one be in possession of goods under the belief that he has a right to maintain possession, and they be demanded of him and he absolutely refuse to deliver them, he has intentionally exercised over them a dominion intentionally inconsistent with the alleged right of him in whose name they were demanded, and in such case it is not difficult to say that the defendant, if the demand was made on behalf of the real owner, has been guilty of a wrongful conversion. But it is where one has dealt with goods as if they were his own without having had possession *of them, or where one has taken goods into his pos- [627 session, but not with intent that they should be his own, or without reference to their being the property of one person or of another, or having goods in his possession has not used them as his own, and where no demand has been made on him for a delivery of the goods to or on behalf of the real owner whilst they were in his, the defendant's, possession, that the real difficulties arise. As to the first, I think it may be rightly said that in no case can a man be guilty of a conversion who has not by himself or his agent had possession of the goods in dispute. A man might, I apprehend, be guilty of a conversion, though he had had possession only by his agent; as if he had authorized an agent to take goods for him, or to use or destroy them, and the agent had obeyed his commands; but if the order had been given and had not been obeyed, I apprehend that the mere order would not be a conversion. So if one enters into a contract to sell, as if they were his own, the goods of another, whether the form of the contract be such as would assume to pass the property at once, or such as could only pass the property on a subsequent delivery, I apprehend that the mere fact of making such a contract is not a conversion.

These propositions seem to me to be assumed or decided in the first point decided in *Lancashire Wagon Company v. Fitzhugh* (*). The real difficulty is where the defendant has had the goods in his actual possession. It is clear that he is not in such case always liable for a conversion, and equally clear that in some such cases he is liable. He is clearly not liable, though he has had actual possession of goods, if he has held them or has assumed to hold them for the real owner. He is clearly liable, as

(*) 6 H. & N., 502; 30 L. J. (Ex.), 231.

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has been said, if he has taken the goods as his own, or has used them as if they were his own, or has upon demand by or on behalf of the real owner refused to give them up. The more material cases in the present case are those in which the defendant has been held not guilty of a conversion, although he has had actual possession of the goods, not as agent for the real owner, but as agent for others. These cases require careful attention. In *Bruen v. Roe* ⁽¹⁾ the proposition is thus stated: "If in trover and conversion an actual taking of goods is given in 628] *evidence, that is sufficiently good without proving a demand and denial, as the taking of my cap from my head; for that is actual conversion; but when the thing comes by trover there ought to be an actual demand and refusal." The actual taking there described is a taking intentionally without or against the consent of the person in possession. The trover implies an actual possession, but is held to be insufficient to constitute a conversion, because consistently with it the defendant may not be claiming anything more than the mere custody of the goods. In *Ross v. Johnson* ⁽²⁾ the defendant, a wharfinger, had had actual possession of the plaintiff's goods without the authority of the plaintiff. But Lord Mansfield held that the mere fact of such possession was not evidence of a conversion. "It is impossible," he said, "to make a distinction between a wharfinger and a common carrier. They both receive the goods upon a contract. Every case against a carrier is like the same case against a wharfinger. But in order to maintain trover there must be an injurious conversion." The phrase hardly seems to help; but the decision upon the facts seems to me to be, that a mere custody of goods without any intention as to the property in them is not a conversion.

In *Greenway v. Fisher* ⁽³⁾ one of the defendants was a packer, who in the regular discharge of his duty had, according to directions from persons wrongfully in possession of the plaintiff's goods, packed and shipped the goods. Lord Tenterden held that there was no conversion by such defendant, although he had had actual possession of the goods and had packed and shipped them. These were acts surely inconsistent in fact with the plaintiff's right of dominion. "On the part of Woodward" (one of the defendants), says Lord Tenterden, "reliance is placed, and I think properly, on the circumstance of his acting in the ordinary course of his business, and I am of opinion that the course of trade in this instance furnishes an exception to the general rule. The distinction between this case and that of a servant is, that here there is a public employment; and as to a carrier, if, while he has the goods, there be a demand and a re-

⁽¹⁾ 2 Sid., 204.⁽²⁾ 5 Burr., 2825.⁽³⁾ 1 C. & P., 190.

fnal, trover will lie; but while he is a mere conduit pipe in the ordinary course of trade, I think he is not *liable." The [629 terms of this judgment seem to me to be hardly satisfactory. The mere fact that the defendant's employment was a public one cannot be the reason. Almost every trade is a public employment. But the butcher who should kill and cut up the plaintiff's beast, or the spinner who should spin his cotton into yarn, would be guilty of a conversion, although the trade would be equally a public employment as that of a packer. The meaning of the expressions must be gathered from the facts of the case. It is that the known nature of the employment of a packer, like that of a carrier or wharfinger, known because it is public, shows that although he has had actual possession of and has made an actual asportation of goods, yet his possession was only a custody, and his asportation was made without reference to or consideration of the question of whose property the goods were.

In *Fouldes v. Willoughby* (1) the defendant took the horses from the plaintiff, who was holding one of them by the bridle, against the will of the plaintiff, and put them on shore. The judge at the trial told the jury that the defendant, by taking the horses from the plaintiff and turning them out of the vessel, had been guilty of a conversion. But the Court held that he was wrong. "In my opinion," says Lord Abinger, "he should have added to his direction, that it was for them to consider what was the intention of the defendant in so doing. It is a proposition familiar to all lawyers, that a simple asportation of a chattel, without any intention of making any further use of it, although it may be a sufficient foundation for an action of trespass, is not sufficient to establish a conversion. It has never yet been held that the single act of removal of a chattel, independent of any claim over it, either in favor of the party himself or any one else, amounts to a conversion of the chattel."

In *Borroughes v. Bayne* (2) Martin, B., gives a definition of the word "conversion." "It means detaining goods so as to deprive the person entitled to the possession of them of his dominion over them." But by the words "so as to deprive" must, I think, where there has been nothing but a detention, be intended "with intent to," or the definition includes the cases of a carrier, wharfinger, packer, and a mere servant acting only as such without notice or *demand. Channell, B., distin- [630 guishes between an "asportation" and a "simple asportation," and distinguishes them according to the intention of the defendant. This judgment seems to me to show that mere actual possession, if only with the intent to have custody of the goods,

(1) 8 M. & W., 540.

(2) 5 H. & N., 296, 302; 29 L. J. (Ex.), 183.

without reference to the question of property in them, is not a conversion; and that an asportation or actual removal and delivery of goods, if it be only a simple asportation, i.e., if it be done with intent only to be a carrier of the goods, without reference to the question of property in them, is equally no conversion.

In *Lancashire Wagon Co. v. Fitzhugh* (*) it was held that the mere sale of goods by a sheriff, who had seized them, and who sold *bonâ fide* and without notice, was not a convenience. The new assignment was sustained because it averred that the sheriff not only delivered the goods but caused the purchasers to use and damage the wagons. That allegation goes further than a mere asportation and delivery as a mere means of conveyance; and if it rested only on the delivery, as I think it might, it is because the delivery under a sale by a sheriff or by an auctioneer is a delivery with intent to pass the property, and so more than a simple asportation and delivery.

The true proposition as to possession and detention and asportation seems to me to be, that a possession or detention, which is a mere custody or mere asportation made without reference to the question of the property in goods or chattels, is not a conversion. This seems to me to be the proposition also to be deduced from the American cases which are ably set forth in the 3d vol. of Robinson's *Practice of Courts of Justice*, pp. 452-462. "The idea of property," he says (p. 459), "is of the essence of a conversion." He then quotes the judgment of Wardlaw, J., in the case of *Nelson v. Whatmore* (?). "This action was brought to recover the value of a slave named Frank, a man of doubtful color, who was passing as free in a public conveyance, and was taken as his servant by the defendant; and the case turned upon the inquiry whether the defendant knew Frank to be a slave. 'If he did not, the treatment of Frank as a servant, and consequent facilities of escape afforded to him, may,' said Warlaw, 631] J., 'have been acts *in themselves lawful, certainly did not indicate an assertion of property.'" In this case there were, as must be seen when it was proved that in fact Frank was the plaintiff's slave, possession and use by the defendant; but under the circumstances, that is, on account of the want of knowledge that the man was a slave, a possession and use without reference to any question of property in the plaintiff, the defendant, or any one else.

On the whole, therefore, I come to the conclusion that a broker who, acting only as such, negotiates a bargain of purchase and sale and passes a delivery order is not thereby guilty of a conversion, so as to be liable in an action of trover; and that in this

(*) 6 H. & N., 502; 30 L. J. (Ex.), 231.

(?) 1 Richardson, 323.

case the asportation, which we are bound to consider, according to the leave reserved, as a simple asportation, without reference or intention as to whose was the property in the goods, is likewise not a conversion. In my opinion the judgment of the Court of Queen's Bench ought to be reversed.

BYLES, J. I concur in the judgment of my brother Brett. I have had the advantage of reading the judgment of my Lord Chief Baron, and, as it is impossible for me to add anything to it, I merely wish to state that I agree with the reasons on which it is founded.

MARTIN, B. My brother Channell concurs in the judgment I am about to deliver.

This is an appeal from a judgment of the Court of Queen's Bench, and the question is whether certain acts of defendants, done under certain circumstances to thirteen bales of cotton, are, in law, a conversion within the meaning of that term in an action of trover. The origin of the action of trover is, I believe, correctly stated in *Burroughes v. Bayne* (1); it was founded on a fiction which at one period it was deemed within the authority of courts of law to invent, and further, to prohibit any contradiction of. The object of this fiction was to get rid of wager of law, which existed in the action of detinue. Bramwell, B., in the above case, much objected to the word "conversion," and when there is a word in common and ordinary use, with a well understood popular meaning, it is to be lamented that it should [632] be used in a legal sense with an artificial and "conventional" meaning. But as regards the action of trover I think it is well settled that the assumption and exercise of dominion — and asportation is an exercise of dominion — over a chattel inconsistent with the title and general dominion which the true owner has in and over it is a conversion, and that it is immaterial whether the act done be for the use of the defendant himself or of a third person. This is stated to be the legal meaning of the term conversion of Alderson, B., in the case *Fouldes v. Willoughby* (2). I believe all the cases that exist were cited in the argument by the learned counsel, but it is unnecessary to refer to them as they are collected in a note (a) by Sir E. V. Williams, in his last edition of Saunders' Reports, vol. ii, p. 108; *Wilbraham v. Snow*: and the result is what I have stated. The case of the carrier was referred to as inconsistent with the above definition. The trade of a common carrier is one of few occupations which the person carrying it on is bound by law to exercise upon the requirement of a person bringing him goods to be carried, and it would be unjust that he should be bound by law to do an act

(1) 5 H. & N., at p. 302; 29 L. J. (Ex.), 185.

(2) 8 M. & W., 540.

which the law, in the event of the person bringing the goods not being the true owner, declared to be an unlawful act; it has, therefore, been deemed that the carrying of goods by a carrier from terminus to terminus, upon the requirement of a person wrongfully in possession of them, is not a conversion, although, if the true owner intervenes before the goods be delivered and demands them, and the carrier refuses to deliver them, he is liable in an action of trover. But the case of *Greenway v. Fisher* ⁽¹⁾ was mainly relied on for the defendants. It was trover for calico. The plaintiff had entrusted it for sale to Messrs. E. & Co., and they had pledged it to two of the defendants for money lent; but the defendants had employed one Woodward (a third defendant) a packer, to pack it, and he had done so and shipped it at the Custom House, making an affidavit that he was the real owner; it was objected that Woodward was not liable, as he had only acted in the regular discharge of his duty. Abbot, C.J., is stated to have said that the circumstance of Woodward [633] acting in the ordinary course of business, and in the course of trade, made an exception to the general rule; and that the distinction between the case and the case of a servant was that this was a public employment; he referred to the case of the carrier, and said he was a mere conduit pipe. A verdict was taken for Woodward. It does not appear that this ruling has ever been acted upon except in the present case; there was no opportunity of taking the opinion of the Court above upon it, as there was a verdict against the other defendants; and notwithstanding the high authority of Abbott, C. J., should a similar case occur, I think it would be a matter to be reconsidered. I do not think that the employment of a packer is a public employment like that of a common carrier for hire. Nor is he bound by law to exercise his employment except at his own pleasure.

The facts of the present case are these. The plaintiffs were the true owners of thirteen bales of cotton, the possession of them had been obtained by a person called Bayley by a fraud. On the 13th of December, 1869, the defendants bought the cotton from Bayley, for cash payable the same day, and proceeded at once to sample it, i.e., to take a portion out of each bale, which their servants did, and about half an hour afterwards they exhibited these samples to a Mr. Micholls, who examined them in order to judge of the quality, and having inquired as to the quantity and price, agreed to take the cotton. It is not stated that Bayley's name was mentioned to Mr. Micholls, but the price was stated and he agreed to buy it and afterwards paid the price, with the addition of 1*l.* 4*s.* 10*d.* for commission and

⁽¹⁾ 1 C. & P., 190.

6s. 6d. for portorage. The next step was that the defendants sent one of their clerks with a cart driven by a carter paid by them to Bayley's warehouse. The cotton was delivered to the clerk, loaded on the cart, and taken to the railway station from whence it was forwarded to Mr. Micholls' firm, at Stockport, and the price was paid by them to the defendants. These are the acts which the plaintiffs rely on as constituting the conversion; the defendants took the cotton into their corporeal possession, they carted it from Bayley's warehouse to the railway station, and delivered it there to be forwarded to Mr. Micholls, at Stockport, knowing that it was intended to be spun into yarn, and received the price. This is, to my mind, a conversion within the above definition. But it is alleged that there was no conversion by reason of the following *circumstances. [634 The defendants were cotton brokers, and the firm of which Mr. Micholls was a partner were their customers. On the morning of the 23d of December they received a message from the firm, stating that they were coming over to Liverpool that day to purchase cotton through them. The cotton which they bought of Bayley was such cotton as the defendants were in the habit of buying for Mr. Micholls' firm, and when they purchased the cotton from Bayley they intended to buy it as brokers for the firm, believing that it was such cotton as they were likely to buy, and that it would suit them, and that on their arrival at Liverpool they could take it. The defendants had many customers, and frequently buy cotton in this way believing that it will suit, and feeling satisfied that their customers will take it, or if not, that they could be able to place it with some other customer. The learned judge who tried the cause left two questions to the jury. First, whether the thirteen bales of cotton were bought by the defendants, as agents, in the course of their business as brokers; and, secondly, whether they dealt with the goods only as agents for their principal. The jury found both questions in the affirmative, and the verdict was entered for the defendants. In one sense this finding was correct. I have no doubt the defendants throughout meant to act as brokers; but in another sense I think it incorrect. I think the facts show a sale by Bayley to the defendants, and a resale by them to Messrs. Micholls, and that however confident the opinion or expectation of the defendants may have been that Messrs. Micholls would take the cotton, I do not think they stood to them in the relation of principals; and in my opinion Bayley, had he been the true owner of the cotton, could not have maintained an action against them for the price, and his only remedy would have been against the defendants. For the present purpose, however, we must assume that the verdict was

right, and in my opinion the facts found by the jury are immaterial. The plaintiffs were strangers to the sale by Bayley, whether it was to the defendants or to Mr. Micholls. I think they are entitled to treat the defendants as wrongdoers, wrongfully intermeddling with the cotton, which they had no legal right to touch; and that when they removed the cotton from the warehouse, where it was deposited, to the railway station 635] to be forwarded to Stockport to be spun into yarn, and *received the price of it, they committed a "conversion." What does it concern the plaintiffs whether the defendants dealt with the cotton and acted as brokers or agents, or principals: they may not have known what the defendants were? Their acts towards the cotton were the same whether they filled the one character or the other. They dealt with them as men committing a wrong and tort towards the plaintiffs' chattel, and in my opinion the acts which they did constitute what the law deems a conversion, notwithstanding that they acted as brokers or agents. It was well put by the learned counsel for the plaintiffs, that suppose the defendants had bought the cotton for a foreign principal, and instead of carting the cotton to the railway station had carted it to the docks to be put on board a steamer to forward it to Bordeaux; could it be that the plaintiffs were bound to go to France to recover the value of their cotton and have no remedy against the defendants? There is no doubt that the plaintiffs could maintain some action against the defendants, who, without lawful authority, intermeddled with their cotton, and in my opinion the action is trover. It may be that, upon this principle, persons may be made liable for the value of a chattel by reason of a very trifling act; but I doubt whether the law could be advantageously altered. It was said that the defendants were innocent of all intention of wrong. There is no doubt of this; but the plaintiffs and Messrs. Micholls were equally innocent, and there can be no doubt that the plaintiffs could have maintained an action of trover against Messrs. Micholls. They actually converted the cotton in the popular sense by spinning it into yarn; and when a loss must fall upon one of the innocent parties the consideration of hardship ought to be altogether put aside, and the loss imposed where the law casts it: see *Stephens v. Elwall* ⁽¹⁾. I am of opinion that the judgment of the Court of Queen's Bench was right, and ought to be affirmed.

I have, since the above was written, had an opportunity of reading my brother Brett's judgment. I quite agree, in the case he puts, viz., A, real owner of goods, which were in wrongful possession of B, with no power to sell, who employed a broker

(1) 4 M. & S., 259.

to sell, who sold them to C, and all that the broker did was to send bought and sold notes to B and C, that no action of trover or any *other action could be maintained by A against [636 the broker. He did nothing but make a contract which was utterly void against A. It is like the sheriff's case referred to by my brother Brett (¹).

But that is not the present case, here the defendants bodily intermeddled with the goods. I further agree that we must take the finding of the jury to be a part of the case, and must take it: first, that the cotton was bought by the defendants as agents in the course of their business of brokers. This, I presume, means that cotton brokers deal with cotton in the same manner as the defendants dealt with this parcel. For no one can doubt but that the defendants bought the goods as principals from Bayley: secondly, that they dealt with them only as agents to their principal. This finding, as I have said, is in my judgment immaterial: whether a man who deals wrongfully with my goods be an agent or principal seems to me to be of no consequence.

CLEASBY, B. (²). I agree in the judgment of my brother Martin; but I wish to add a few words to show that I agree substantially with the reasons given by the learned judges in the Court of Queen's Bench, and I do not think that when properly considered they are at variance with the finding of the jury.

It was an action of trover to recover the value of certain cotton, and there being a plea of not guilty the question was whether there was sufficient evidence of a conversion. The defendants were brokers, and the jury found that in dealing with the cotton the defendants had acted in their character of brokers and not as principals; and the defendants contended that this finding, when applied to the circumstances of the case, had the effect of negating a conversion by the defendants.

In order to apply this finding it is necessary to consider the facts as stated in the case on appeal; and I may as well at once indicate what my conclusion is, viz., that although the defendants never intended to buy on their own account, and to act in any other character than that of brokers; and although the sellers never understood them to buy on their own account as the real *principals or to act in any other character than [637 that of brokers (as the jury quite properly found), yet by reason of the real principles not being known, and therefore not disclosed at the time when the bargain was made, the defendants necessarily became the parties to the contract, until the real

(¹) *Lancashire Wagon Co. v. Fitzhugh*,
6 H. & N., 502; 30 L. J., (Ex.), 231.

(²) This judgment was read by Martin,
B.

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principals being ascertained were named and adopted by the sellers as the persons they would look to. The plaintiffs were the owners of thirteen bales of cotton, of which a person named Bayley, who carried on business as a cotton broker under the firm of H. K. Bayley & Co., had obtained possession by means of a fraud. Paragraph 8 states the transaction between Bayley and the defendants. It appears from the statement there that the defendants, who were known to be acting as brokers, having been shown samples of cotton "*ex Minnesota*," agreed to buy the thirteen bales at the price of 11½d. per lb., and they were to send the name of their principal in the course of the day. They also agreed at the same time to buy twenty-five other bales; and the following memorandum was handed by Bayley to the defendants: "We sell you 13 B's 11½,— 25 B's 11½. Cash to-day per H. K. Bayley & Co."

It seems clear that this was not a conditional transaction (I mean conditional upon the name of the principal being sent in), but an absolute sale between Bayley and the defendants. The defendants being brokers wished to secure the sale of the cotton and were content to bind themselves, having no doubt as to finding a purchaser, and Bayley was satisfied with the price and the responsibility of the defendants, although the defendants were not to buy as real principals and sell at a profit, but as brokers for a principal whose name was to be given. It would be most unreasonable to suppose that Bayley was to take as principals any persons whatever whose names the defendants sent in, whether he approved of them or not, or that the contract should be conditional upon his approving of them. And accordingly it was not contended before us that the transaction was a conditional one, but that the defendants were acting as brokers in the transaction, as was undoubtedly the fact.

That being so, it was necessary that the defendants, in order to find principals, or (which is the same thing) purchasers should require samples of the thirteen bales, the subject of the contract; 638] *and they apply to Bayley, as I apprehend they had a right to do, and their servants take the samples. It appears to me that it might well be contended that this taking the samples out of the thirteen bales which formed the subject of sale to them was exercising an act of ownership. For as soon as the thirteen bales were ascertained, the defendants had a right to deal with them subject to any claim which Bayley, as unpaid vendor, might insist upon, which he does not appear to have done.

But it is not necessary to insist upon this act of ownership as a conversion, because what takes place afterwards on the same day makes the matter, in my opinion, quite clear. As soon as Michöls, Lucas, & Co. agree to buy the cotton, the defendants

send a delivery order to Bayley, in which the name of their principals, Micholls, Lucas, & Co., is given according to their engagement. This delivery order was to deliver to the bearer who was Thompson, the servant of the defendants; and accordingly Bayley writes across it, "To Joseph Thompson," and signs this, and Thompson endorses a receipt for the cotton: see paragraph 14.

It thus appears that the delivery was not to Micholls, Lucas, & Co. (who would have to settle with the defendants for the price before they were entitled to delivery), but to the defendants; and accordingly, after this has been done, and the cotton has been weighed, Bayley sends in his invoice for the cotton; and although the name of Micholls, Lucas, & Co., the real principals, had been disclosed, the invoice is sent in to the defendants, and they are made the debtors. The invoice is set out in paragraph 14, and headed thus: "Messrs. Francis Hollins & Co. Bought from H. K. Bayley & Co." It is plain, therefore, that Bayley refused to deal with Micholls, Lucas, & Co. as principals; and held the defendants as the persons responsible to him as buyers, which he was entitled to do, no principal having been disclosed when the contract was made. It was therefore in this right, as the person entitled to the possession of the cotton as buyers from Bayley, that the defendants obtained possession of it for the purpose of transferring the property in it to their principals, Micholls, Lucas, & Co., and this dealing with the property appears to be a clear conversion upon all the authorities. The defendants acted as brokers, but from the circumstances attending the contract they became themselves interested in it.

*I wish to add, that in my opinion it is not necessary to [639 overrule *Greenway v. Fisher* ⁽¹⁾. That case is like the case of shoeing a horse, or mending a watch, and sending it home. It is true that the shipment was in the name of the defendant, but no one would suggest that by writing his name in as owner he intended to claim the property or to deal with the property. It was only complying with the directions as to sending the goods back, and the entry of the name was a necessary form for the purpose. In that case there was no intermeddling with the property in the chattel; in the present case all that is done is for the purpose of transferring the property.

The action of trover is not founded upon contract or upon any particular relation of the parties, but upon property, and suppose the owner to have lost the goods, as the plaintiffs may in some sense be said to have done in this case; and the liability under it is founded upon what has been regarded as a salutary rule for the protection of property, namely, that persons deal with the property in chattels or exercise acts of ownership over them at their peril.

(¹) 1 C. & P., 190.

No one could dispute that if the defendants had made a sub-sale of the cotton they would have been responsible, though they bought in and paid for it in the ordinary way; and if they are not responsible in the present case it follows that they could, at their option, select any persons they thought proper to deliver the cotton to, and make the persons so selected by them the only persons responsible to the plaintiffs, the real owners.

KELLY, C.B. In this case, but for the finding of the jury, I should have been prepared to agree with the learned judges of the Queen's Bench, that there was evidence to be submitted to the jury of such a conversion by the defendants as might have sustained this action, though I am by no means satisfied that any such verdict ought to have been found. But after carefully considering the judgments of the learned judges, I do not see that any effect is given to the finding of the jury, and it seems to be assumed that the defendants acted in the transaction as purchasers and sellers, and not as brokers.

640] *It is necessary, therefore, to look to what the jury have expressly found, and consider its effects upon the case as it is now before us upon a motion to enter a verdict for the plaintiffs. The questions left by my brother Willes to the jury were whether the thirteen bales were bought by the defendants as agents in the course of their business as brokers, and whether they dealt with the goods only as agents to their principals; and upon both points the jury found for the defendants.

Before, therefore, the defendants could be treated as principal in the sale and purchase of the goods, it seems to me that these findings of the jury should have been set aside. But not only has this not been done, but it was stated at the bar, and not denied that a motion has been made in the Queen's Bench to that effect, and a rule refused. The defendants then having throughout acted as brokers and dealt with the goods only as agents to their principals, it would be to extend the doctrine of conversion far beyond the operation of the authorities cited at the bar, to hold that they were more than conduit pipes (to use the expression of Lord Tenterden) between Bayley and Micholls & Co., or that they were guilty of a conversion in merely negotiating the purchase and sale, and assisting as agents in the transfer of the goods from Bayley to Micholls & Co. It is true that as Micholls & Co. were not named at the time of the purchase, the vendor might have held the defendants personally liable; but as the price was paid to the vendor, and with the money of the real purchasers, the defendants receiving only their commission as brokers, it does not appear to me that this circumstance altered the character of the transaction, and made the acts of the defendants to amount to a conversion.

I cannot think that the doctrine of conversion, as applied to transactions effected openly *bonâ fide* and in the ordinary course of the business of merchants and brokers in London or Liverpool, should be extended in the smallest degree beyond the necessary result of established decisions. And the logical and exhaustive judgment of my brother Brett, which I have had an opportunity of reading, seems to me to show that brokers are not more within the scope of those decisions than carriers or packers. Why should a broker who negotiates a contract between buyer and seller, in his character of broker, being the mere medium of communication between *the one and the other, [641 and deriving no other benefit from the transaction than his commission, be made liable for the whole value of the goods purchased and sold, any more than the packer who packs and ships the goods, or the railway company that conveys them from the seller's to the purchaser's premises? And that because the real owner has permitted himself to be defrauded of them by the pretended sellers. Surely in such a case where one of two innocent parties must sustain a loss, it should be he who by having entrusted his property to an untrustworthy person has enabled or facilitated the commission of the fraud by which the loss has been occasioned.

It is true that a conversion has been correctly defined to be the exercising of dominion over property inconsistent with the title of the other. But justice, expediency, public policy, and common sense, have introduced exceptions or qualification to this doctrine. A carrier, who delivers a quantity of merchandise to one who claims and receives it as owner, a packer, who packs and prepares for shipment and actually ships and consigns goods to one who receives and deals with them as his own, exercises dominion over them adversely to and inconsistent with the rights of true owner. Why then should not a broker, who interferes in the transfer of goods, not in his own right or on his own account, or claiming them as his own, but as the medium only between the vendor and the purchaser, deriving no benefit from the transaction except his commission, be held equally within the exception which has been applied to carriers and packers? Considering the vast number and variety of the transactions effected, and the immense amount of property dealt with by brokers acting in the ordinary and accustomed course of business, in London and Liverpool, and other great commercial towns, it seems most unreasonable and unjust that they should be bound to inquire into the titles of all the sellers of all the merchandises in respect of which they negotiate contracts as brokers, or incur the risk of being compelled to make good the value to some unknown owners, who have been improvident

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enough to part with them to a dishonest person, in whom they have reposed a misplaced confidence. Then can it make any difference that the broker, acting under a *del credere* commission, or otherwise, as by contracting for an unnamed principal, makes [642] *himself personally liable? I think not, and that he must still be treated as an agent only. If he were so liable, a mere collateral surety for the acceptance or delivery, or the payment of the price of goods, might be held guilty of a conversion without having interfered in the transaction except by becoming such surety. It may be true that in some cases the taking of samples or the carting and delivery of goods may be a conversion by a purchaser, who treats them as his own; but a broker who does these acts, in the capacity of broker only, is no more guilty of a conversion than an officer at the London docks who draws samples of wine in a warehouse, or a railway carrier who sends his own carts, and conveys goods between the railway and the premises of the consignor and consignee. The case of goods sent abroad, where they cannot be traced and followed by the owner into the hands of the purchaser, rests altogether upon an exceptional principle, which I think inapplicable to the present case. And on the ground that the defendants here have acted as brokers and brokers only, and have exercised no dominion over these goods in their own right and for their own benefit, I am of opinion that they are not guilty of a conversion which will support this action, and the verdict they have obtained ought not to be disturbed.

Judgment affirmed.

Attorney for plaintiffs: Wynne.

Attorneys for defendants: *Chester & Urquhart, for Lacc, Banner & Co., Liverpool.*

One who, in good faith, assists another in possession of property in effecting a sale of it is liable to the true owner thereof, although he whom he assists be a mortgagor in possession. *Dudley v. Hawley*, 40 Barb., 397.

He would not however be liable, for merely receiving the goods without any further or other act relative thereto. *Dudley v. Hawley*, 40 Barb., 397.

So one who connives at a purchase by

another, as by furnishing him with means for the purpose, and with the intent of having him purchase and put the property beyond the reach of the true owner of the goods of a third person from one having possession thereof is liable. *Moore v. Eldred*, 42 Vermont, 13. Otherwise as to a mere depositary who, in good faith, returns the property to the depositor. *Hill v. Hayes*, 38 Conn., 532.

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[661]

*ROSS v. FEDDEN and another.

[Law Reports, 7 Queen's Bench, 661.]

Adjoining Occupiers—Non-liability of Occupier of Upper Floor of House to Occupier of lower Floor for Escape of Water.

The plaintiff occupied for business purposes the ground floor and the defendants the second floor of the same house, respectively, as tenants from year to year.

There was a water closet on the defendants' premises to and of which they alone had access and use. After their respective premises had been closed on a Saturday evening, water percolated from the water closet through the first floor to the plaintiff's premises and caused damage to his stock in trade. The overflow of the water was owing to the valve of the supply pipe to the pan having got out of order and failed to close, and the water pipe being choked with paper. The defects could not be detected without examination, and the defendants did not know of them, and were guilty of no negligence:

Held, that there was no obligation on the defendants to keep in the water at their peril; and that they were not liable to the plaintiff for the damage.

CASE on appeal from the County Court of Northumberland holden at Newcastle.

The plaint was tried before the deputy judge without a jury, and he took time to consider. The following was the written judgment delivered by him ⁽¹⁾.

The plaintiff is tenant from year to year of the ground floor of No. 2 Queen Street, Newcastle, where he carries on business as an ironmonger. The defendants are tenants from year to year of the second floor of the same house, which they occupy as offices. Some time between the evening of Saturday, the 26th of November, and the morning of Monday, the 28th of November, 1870, water escaped from a water closet in the defendants' premises, found its way down through the first floor to the ground floor and there did damage to the plaintiff's premises and goods to the extent of 79*l.* 5*s.* 3*d.* This damage the plaintiff seeks to recover from the defendants in the present action.

The plaintiff's claim to recover is put upon two grounds. First it is said that the mischief arose from the negligence of the *defendants. Now upon this matter the evidence is very [662 slight, and there is no inconsistency in it. The closet was inside the defendants' private office, and no one had access to it but the two partners in the defendants' firm, and it was for their exclusive use. One of the partners was from home at the time of the occurrence. The other partner, who was called as a witness, stated that the closet had previously to the Saturday been in good order, that he believed he had used it on Saturday morning and found nothing amiss, and no one could have used it afterwards; that on the Saturday evening at about 6 or 6.30 he washed his hands at the wash hand stand in the same room with the closet, and nothing then appeared to be the matter with it. He then left the office, and no one appears to have entered it again until Monday morning.

On the Monday morning, when the plaintiff came to his shop, he found the damage done of which he now complains. Together with a plumber, whom he had sent for, he traced the

⁽¹⁾ The judgment was not made part of the case, but there being doubts as to the meaning of parts of the case (which had been settled without reference to

the deputy judge), *Bruce* read the judgment as part of the case; and as the facts are fully stated in the judgment, it is unnecessary to repeat them.

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escape of water upwards to the second floor. They obtained access to the defendants' offices and the closet inside, and found that the water had overflowed the pan. On examination it appeared the cause of this was that the valve admitting the supply of water to the pan had given way and failed to close, and the overflow pipe had become stuffed with paper. The valve, the defect in which was the real cause of the mischief, was under the seat of the closet, and could only be reached or seen by removing the woodwork.

Upon this evidence I think the defendants are not shown to have been guilty of any negligence. Up to Saturday evening there was no reason to suspect that the valve had given way, or was in any danger of giving way, or that anything was wrong with the closet, and I see no negligence in not guarding against a danger which there is no reason to anticipate. Upon the first question, therefore, which is one of fact, my opinion is in favor of the defendants.

But it has been argued, secondly, on behalf of the plaintiff, that he is entitled to recover, even in the absence of any negligence on the part of the defendants, upon the authority of *Rylands v. Fletcher* ⁽¹⁾ and other cases similar in principle. In that case it was decided that, as between adjoining owners, one 663] who diverted water from its *natural flow, and accumulated it on his own land for his own purposes, is bound at all hazards to prevent its escape, and if it does escape, negligence or no negligence, he is responsible to his neighbor for the consequences. It is contended that the same rule applies to this case. On the other hand, the case of *Carstairs v. Taylor* ⁽²⁾ has been cited. In that case the plaintiff was the occupier of the ground floor of a warehouse, and the defendant of the upper part. The water from the roof was collected by gutters into a box, from which it was discharged by a pipe into the drains. A rat made a hole in the box, the water escaped and injured the plaintiff's goods in his warehouse below; and it was held that the defendant was not liable for this damage. That case is not, I think, at all a direct authority for the decision of the present; it differs in two important particulars. The apparatus for conducting the water was there as much for the benefit of the plaintiff as of the defendant, a fact upon which much stress is laid in the judgment of Bramwell, B.; whilst here the water-closet was solely for the defendants' benefit; and further, in that case, the circumstances that caused the damage was one falling under the head of vis major, a fact to which much weight is given by the Lord Chief Baron and Martin, B. This cannot be said in the present case. I think, however, that the judgment in *Carstairs*

(1) Law Rep., 3 H. L., 330.

(2) Law Rep., 6 Ex., 217.

v. *Taylor* ⁽¹⁾ leaves it very doubtful whether the rule of law, laid down in *Rylands v. Fletcher* ⁽²⁾ in the case of adjacent owners, applies to the case of two persons occupying two floors of the same house. But assuming the rule to apply, is the present case within it? As between the occupiers of parts of a house — a thing wholly artificial — it is rather a straining of language to speak of any one state of things as more natural than another. But I think that in the words of Martin, B., in the case already referred to, “one who takes a floor of a house must be held to take the premises as they are.” As far as he is concerned, I think the state of things then existing may be treated as the natural state of things, and the flow of water through cisterns and pipes then in operation as equivalent to the natural flow of water; I think he takes subject to the ordinary risks arising from the use of the rest of the house as it stands; and that one who merely continues to use the rest of the house as it stands and in the *ordinary manner does not fall within the rule laid [664] down in *Rylands v. Fletcher* ⁽²⁾, and in the absence of negligence, is not liable for the consequences; and in the present case there is nothing to show, nor has it been suggested, that the water-closet or anything connected with it has been in any way altered by the defendants since they came into occupation. There is nothing to show, nor has it been suggested, that it has been in any way altered since the plaintiff became tenant of the ground floor, or that it has been used in any but the ordinary manner. The question is one of some difficulty, but my opinion is that under the circumstances of the case, in the absence of negligence on the part of the defendants, they are not liable for the damage which the plaintiff has sustained.

The questions for the opinion of the Court were: 1st, Was not the judge wrong in ruling that there was no evidence of negligence on the part of the defendants? 2d, If negligence was proved, ought not the judgment of the Court to have been for the plaintiff? 3d, Even in the absence of negligence, was it not the duty of the defendants so to use their premises that they should not injure those of the plaintiff, and therefore should not the judgment have been for the plaintiff? Lastly, Whether or not on the whole case the judgment of the learned judge was not wrong in point of law.

G. Bruce, for the plaintiff. The principle of *Rylands v. Fletcher* ⁽²⁾ applies to this case. The plaintiff and defendants are in the relative position of adjoining occupiers; and if one for his own use has accumulated water upon his premises, he must keep it in at his peril. In *Curstairs v. Taylor* ⁽¹⁾ the water was only that which accumulated from natural causes, viz., the

⁽¹⁾ Law Rep., 6 Ex., 217.

⁽²⁾ Law Rep., 3 H. L., 330.

rain. The present is the converse of *Humphries v. Brogden* ⁽¹⁾. Just as in that case the occupier of the under ground was held bound to leave support for the surface, so here the occupier of the upper floor is under an obligation to see that the landlord's water pipe is in good order (for the landlord cannot do so), or to recoup the landlord or his tenants for the consequences.

665] **[BLACKBURN, J.* The cases are not analogous. Suppose the under walls, not obviously in a dilapidated or dangerous state, fall, according to the argument for the plaintiff, the upper man would have a right of action against the under man for not keeping up the upper walls.]

C. Hall, for the defendants, referred to the note to *Pomfret v. Ricroft* ⁽²⁾, and *Chauntler v. Robinson* ⁽³⁾, and was then stopped by the Court.

BLACKBURN, J. It was very proper on the part of Mr. Bruce to read the judgment of the deputy county court judge; the judgment is very well argued out, and I was prepared to agree with it as soon as I heard it read. I think it is impossible to say that defendants as occupiers of the upper story of a house were liable to the plaintiff under the circumstances found in the case. The water closet and the supply pipe are for their convenience and use, but I cannot think there is any obligation on them at all hazards to keep the pipe from bursting or otherwise getting out of order. The cause of the overflow was the valve of the supply pipe getting out of order and the escape pipe being choked with paper, and the judge has expressly found that there was no negligence; and the only ground taken by the plaintiff is, that, the plaintiff and defendants being occupiers under the same landlord, the defendants, being the occupiers of the upper story, contracted an obligation binding them in favor of the plaintiff, the occupier of the lower story, to keep the water in at their peril. I do not agree to that; I do not think the maxim "Sic utere tuo ut alienum non lædas" applies. Negligence is negatived; and probably, if the defendants had got notice of the state of the valve and pipe and had done nothing, there might have been ground for the argument that they were liable for the consequences; but I do not think the law casts on the defendants any such obligation as the plaintiff contends for. The judgment must, therefore, be affirmed.

MELLOR, J. I am of the same opinion. I was prepared to listen to any authority in favor of the plaintiff, but none has been found. In the absence of negligence there is nothing in 666] the *relative position of the parties which would make the defendants liable. The statement in the case rendered the

⁽¹⁾ 12 Q. B., 739; 20 L. J. (Q. B.), 10. ⁽²⁾ 1 Wms. Saund., at p. 121, n. (1).

⁽³⁾ 4 Ex., 103.

ground of the judge's decision doubtful, but this was cleared up when the judgment was read. I was very glad that this was done. I am quite satisfied with the reasoning in it. *Rylands v. Fletcher* ⁽¹⁾ does not apply; and *Carstairs v. Taylor* ⁽²⁾ is a much stronger case than the present, as it seems to me, in favor of the defendants.

LUSH, J. I am of the same opinion. I go along with the judgment of the learned deputy judge, which I think sound and well reasoned.

Judgment for the defendants.

Attorneys for plaintiff: *Paterson, Wigg, & Co., for G. Armstrong, Newcastle.*

Attorneys for defendants: *Kynaston & Gasquett.*

⁽¹⁾ Law Rep., 3 H. L., 330.

⁽²⁾ Law Rep., 6 Ex., 217.

A building may be the subject of ownership in fee although its owner may have no further interest in the land on which it stands than a right to have it remain there. 1 Washb., Real Estate, 12, marg. p. 4.

No one may have an estate in a single chamber in a dwelling house. 1 Washb., Real Estate, 12, marg. p. 4; *Doe v. Burt*, 1 Term. R., 701.

And may have a seizin of such house or chamber, and may maintain ejectment therefor, if deprived of its possession. 1 Washb., Real Estate, 12, marg., p. 4; *Doe v. Burt*, 1 Term. R., 701; *Otis*

v. Smith, 9 Pick., 293, 297, 298.

Although if such house or chamber be destroyed, all interest of the owner thereof in the land on which it stood might be thereby lost. 1 Washb., Real Estate, 12, marg., p. 4; *Stockwell v. Hunter*, 11 Met., 448.

There may be several distinct tenements under the same roof; and tenements are as essentially distinct, when one is under the other, as when one is by the side of the other. *Proprietors of Meeting House v. City of Lowell*, 1 Met., 541; *Loring v. Bacon*, 4 Mass., 575, 576.

July 6.

PHILLIPS V. FOXALL.

[Law Reports, 7 Queen's Bench, 666.]

Guarantee — Concealment of Dishonesty of Servant — Discharge of Surety.

On a continuing guarantee for the honesty of a servant, if the master discovers that the servant has been guilty of dishonesty in the course of the service, and instead of dismissing the servant, he chooses to continue him in his employ without the knowledge and consent of the surety, express or implied, he cannot afterwards have recourse to the surety to make good any loss which may arise from the dishonesty of the servant during the subsequent service.

Declaration on a contract whereby the defendant guaranteed the honesty of one J. S., a servant in the employ of the plaintiff, to the extent of 50*l*. The declaration set out the employment of J. S., and that it was his duty to collect money for the plaintiff and account to her for all sums of money so collected; and that the plaintiff had, before the giving of the guarantee, held in her hands a sum of money belonging to J. S. as a security for the proper performance by J. S. of his duty, which sum the plaintiff had agreed to pay back to J. S. on receiving the defendant's guarantee. The declaration then alleged that in consideration that the plaintiff would pay over to J. S. the money so held and continue him in the service of the plaintiff, in the same capacity as before, the defendant guaranteed and promised the plaintiff to make good and be answerable to her for any loss not exceeding 50*l*. which she might at any time sustain through any breach of his duty by J. S. during the continuance of such service. Breach, that J. S.

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failed to pay over money to the amount of 50*l.* which he had collected. In answer to this declaration the defendant divided the time during which the service 667] lasted, and during which the *loss was sustained into two periods: first, from the 8th of June, 1869, when the contract was made, to the 20th of November, 1869; secondly, from the last mentioned day to the 6th of April, 1871, when the service terminated. As to the first, the defendant admitted his liability. As to the other he pleaded, on equitable grounds, that J. S. had been guilty of defalcations in the course of his service between the 8th of June and the 20th of November, 1869, which the plaintiff discovered on the latter day, and that the plaintiff, without communicating such discovery to the defendant, and while the defendant was ignorant of J. S.'s dishonesty, agreed with J. S. to continue him in her employ as before, and J. S. agreed to pay to the plaintiff 8*l.* a month on account of the previous defalcations; that J. S. was continued in plaintiff's service accordingly on those terms; and that the loss in respect of which the plea is pleaded was occasioned by acts of dishonesty committed by J. S. during the continuance of the service after the 20th of November, and between that time and the termination of the service, the defendant being during that time wholly ignorant of the previous defalcations of J. S.; and that by reason of the plaintiff not giving the defendant notice of such defalcations he was prevented from revoking the guarantee:

Held, on demurrer, that the plea was a good answer to the declaration.

By Cockburn, C.J., Lush and Quain, JJ., on the ground that, as the obligation of the surety is continuing, the obligation of the creditor also continues; and that the representation and understanding, as to the trustworthiness of the servant, on which the contract was originally founded, continue until its termination.

By Blackburn J., that the surety was discharged, because by continuing J. S. in her service, after knowledge of the misconduct, the plaintiff had deprived herself of the right of terminating the service, a right which the surety was entitled in equity to have exercised for his protection.

Burgess v. Ecc 2 English Rep., 379, (Law Rep., 13 Eq., 450), approved.

DECLARATION that one J. Smith was in the service and employment of the plaintiff in the way of her trade and business as a tea merchant, in the capacity of a van man, and that it was the duty of J. Smith, in the course of such service and employment, and in that capacity, to receive and collect sums of money from the customers of and for and on account of the plaintiff, and to pay over such moneys, when so received and collected, to the plaintiff; and that the plaintiff then had and held for and on account of J. Smith and as a security to the plaintiff, with the assent of J. Smith for the due and faithful performance by him of his duties as such van man, a large sum of money of and belonging to J. Smith, and that J. Smith requested the plaintiff to give up the security, and to pay over to him the money of his so then held by the plaintiff, and to continue him in her service and employ in the capacity aforesaid after and notwithstanding 668] standing that the money had been so *paid over to him, which the plaintiff consented to do upon the defendant in lieu of the security guaranteeing and promising to be answerable to the plaintiff for any loss, not exceeding the sum of 50*l.* in all; which she might from time to time or at any time thereafter sustain through any breach of such duty as aforesaid on the part of J. Smith in and during the course and continuance of his

service and employment by the plaintiff in such capacity as aforesaid; and thereupon, in consideration that the plaintiff would relinquish and give up the security by paying over to J. Smith the money of his so then held by the plaintiff, and would continue J. Smith in her service and employ in the capacity aforesaid after and notwithstanding the relinquishment of the security, the defendant guaranteed and promised the plaintiff to make good and be answerable to her for any loss not exceeding the sum of 50*l.* in all, which she might from time to time or at any time thereafter sustain through any breach of such duty on the part of J. Smith in and during the course and continuance of his service and employment by the plaintiff; and that the plaintiff, relying upon the promise of the defendant, afterwards, and under and in pursuance of the agreement, paid over to J. Smith the money of his so then held by her, the plaintiff; and that after the making of the agreement she, the plaintiff, sustained loss to an amount exceeding the sum of 50*l.* through divers breaches of duty on the part of J. Smith in and during the course and continuance of the service and employment by the plaintiff, by reason of his having failed to pay over to the plaintiff certain moneys received and collected by him in the course of and during the continuance of the service and employment from certain customers of the plaintiff for and on her account; that all conditions precedent had been fulfilled, yet neither J. Smith nor the defendant had ever made good or repaid to the plaintiff the loss to the extent of 50*l.* so sustained by her.

Pleas, 1. As to so much of the plaintiff's claim as arises in respect of moneys received and collected by J. Smith in the course and during the continuance of the service from certain customers after the making of the agreement on the 8th of June, 1869, and prior to the 20th day of November, 1869, payment into court of 10*l.*

2. As to the residue of the plaintiff's claim, upon equitable grounds, that after the making of the agreement on the 8th of *June, 1869, and prior to the 20th of November, 1869, [669 J. Smith received and collected in the course and during the continuance of his service and employment divers sums of money from customers of the plaintiff for and on her account, which sums of money so received and collected it was the duty of J. Smith to pay over to the plaintiff; and J. Smith, in violation of the duty, failed to pay over to the plaintiff large sums of the moneys so collected and received, and embezzled the same; and the plaintiff sustained a loss by the breaches of the duty by J. Smith, to wit, the amount of 57*l.*, all of which breaches of duty were to the extent of 50*l.* covered and secured by the agreement

of the defendant, and to make good which, to the extent of 50%, the defendant was under the agreement liable. That the plaintiff discovered and became aware of the breaches of duty and embezzlements by J. Smith on or about the 20th of November, 1869; and the plaintiff, without communicating to the defendant, or informing him of the breaches of duty, defalcations, and embezzlements of J. Smith, or any or either of them, agreed with J. Smith that he should continue in the service and in the performance of the duty of collecting and receiving moneys for and on behalf of the plaintiff, and should pay to the plaintiff a sum of 3*l.* per month in liquidation of the sum of 57*l.* then due and owing by J. Smith in respect of the defalcations and breaches of duty and embezzlements; and thereupon the service of the plaintiff and the performance of the duty of receiving and collecting moneys for and on behalf of the plaintiff until the 4th of April, 1871, was continued; and during the service so continued from the 20th of November, 1869, J. Smith paid large sums of money to the plaintiff in reduction and discharge of the defalcations, breaches of duty, and embezzlements, to wit, 48*l.*; and after the discovery of the defalcations and embezzlements, and after the arrangement for liquidation by J. Smith, and during the continuance of J. Smith in the service and in the discharge of the duty of receiving and collecting moneys for and on behalf of the plaintiff, J. Smith received and collected the moneys for and on account of the plaintiff comprised in the residue of the plaintiff's claim in the declaration mentioned herein pleaded to; that during the whole of the time in which J. Smith [670] received and collected *the sums of money in manner aforesaid, the defendant was wholly ignorant of the defalcations and embezzlements and breaches of duty prior to the 20th of November, 1869; and that by reason of the non-disclosure to the defendant by the plaintiff of the default and embezzlement the defendant was prevented from immediately revoking the guarantee, and from at once compelling J. Smith to pay the defendant the moneys he was liable under the agreement to pay the plaintiff. And that the plaintiff continued J. Smith in the service and in the performance of the duty after the discovery of the first mentioned defalcations and embezzlements without communicating the same to the defendant, contrary to good faith and the true intent and meaning of the agreement.

Demurrer and joinder in demurrer.

April 23. *F. M. White*, in support of the demurrer.

Willis, contra.

The arguments sufficiently appear from the judgments.

In addition to the cases mentioned in the judgments, the fol-

lowing were cited: *Black v. Ottoman Bank* (¹); *Gordon v. Culvert* (²); *Frank v. Edwards* (³); *Pybus v. Gibb* (⁴); *North Western Ry. Co. v. Whinray* (⁵); *Offord v. Davies* (⁶); *Skillett v. Fletcher* (⁷).
Cur. adv. vult.

July 6. The judgment of Cockburn, C.J., Lush, and Quain, J.J., was delivered by

QUAIN, J. This is an action brought by the plaintiff on a contract whereby the defendant guaranteed the honesty of one John Smith, a servant in the employ of the plaintiff, to the extent of 50*l.* The contract is set out in the declaration, and recites the employment of Smith, and that it was his duty to collect money for the plaintiff, and account to her for all sums of money so collected, and that the plaintiff had before the giving of the guarantee held in her hands a sum of money belonging to Smith as a security *for the proper performance by Smith of his [671 duty which sum the plaintiff had agreed to pay back to Smith on receiving the defendant's guarantee. The declaration then proceeds to allege that in consideration that the plaintiff would pay over to Smith the money so held, and continue him in the service of the plaintiff in the same capacity as before, the defendant guaranteed and promised the plaintiff to make good and be answerable to her for any loss, not exceeding 50*l.*, which she might at any time sustain through any breach by Smith of his duty during the continuance of such service; and it alleges a breach, in the usual form, that Smith failed to pay over sums of money to the amount of 50*l.* which he had collected on behalf of the plaintiff.

In answer to this declaration the defendant divides the time during which the service lasted, and during which the loss was sustained, into *two* periods: first, from the 8th of June, 1869, when the contract was made, to the 20th of November, 1869; and, secondly, from the last mentioned day to the 4th day of April, 1871, when the service terminated. As to the first period the defendant admits his liability for loss incurred by the acts of the servant during that period, and he has paid 10*l.* into court which he alleges is sufficient to reimburse the plaintiff for such loss. As to the second period he pleads a plea on equitable grounds, which is to this effect:— that the servant had been guilty of defalcations in the course of his service between the 8th of June and the 20th of November, 1869, which the plaintiff had discovered on the latter day, and that the plaintiff then, without communicating such discovery to the defendant, and

(¹) 15 Moo., P. C., 472.

(²) 2 Sim., 253.

(³) 8 Ex., 214; 22 L. J. (Ex.), 42.

(⁴) 6 E. & B., 902; 26 L. J. (Q.B.), 41.

(⁵) 10 Ex., 77; 23 L. J. (Ex.), 261.

(⁶) 12 C. B. (N.S.), 748; 31 L. J. (C. P.), 319.

(⁷) Law Rep., 2 C. P., 469.

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while the defendant was ignorant of the servant's dishonesty, agreed with the servant to continue him in her employ as before, and the servant on the other hand agreed to pay to the plaintiff 3*l.* a month on account of the previous defalcations. The plea then alleges that the servant was continued in the plaintiff's service accordingly on those terms. The plea then goes on to state, that the loss in respect of which the plea is pleaded was occasioned by acts of dishonesty committed by the servant during the continuance of the service, as so agreed on, after the 20th of November, and between that time and the termination of the service, the defendant during that time being wholly ignorant [672] of the previous defalcations of the servant; *and that by reason of the plaintiff not having given the defendant notice of such defalcations he was prevented from revoking the guarantee.

To this plea the plaintiff has demurred, and the question argued before us was whether the plea afforded a good defence to so much of the cause of action as it was pleaded to, namely, the loss occasioned by the defalcations of the servant committed between the 20th of November and the end of the service.

We are of opinion that the plea is good.

We think that in a case of a continuing guarantee for the honesty of a servant, if the master discovers that the servant has been guilty of acts of dishonesty in the course of the service to which the guarantee relates, and if instead of dismissing the servant, as he may do at once and without notice, he chooses to continue in his employ a dishonest servant, without the knowledge and consent of the surety, express or implied, he cannot afterwards have recourse to the surety to make good any loss which may arise from the dishonesty of the servant during the subsequent service.

Suppose that the state of facts, which has arisen here in the course of the service, had existed before or at the time when the guarantee was given, in other words, that the servant had previously committed defalcations in the plaintiff's service, and had agreed to repay them at the rate of 3*l.* a month, and that this fact had been concealed by the master from the defendant when he gave the guarantee, it cannot, we think, be doubted that a fraud would have been committed on the surety which would have relieved him from all liability on the contract. This we think is established by the judgments of the House of Lords in *Smith v. Bank of Scotland* ⁽¹⁾, and in *Railton v. Mathews*. ⁽²⁾ In the former case Lord Eldon says, "If a man found that his agent had betrayed his trust, that he owed him a sum of money, or that it was likely he was in his debt; if under such circumstances he required sureties for his fidelity, holding him out as a trust-

(1) 1 Dow, 272, 292.

(2) 10 Cl. & F., 934, 943.

worthy person, knowing, or having ground to believe, that he was not so, then it was agreeable to the doctrine of equity, at least in England, *that no one should be permitted to [673 take advantage of such conduct even with a view to security against future transactions of the agent." In the latter case Lord Cottenham cites with approbation the opinion of Lord Eldon in *Smith v. Bank of Scotland* (¹), and Lord Campbell adds, "If the defenders had facts within their knowledge which it was material the sureties should be acquainted with, and which the defenders did not disclose, in my opinion the concealment of those facts — the undue concealment of those facts — discharges the surety."

We do not think that the principles of law as laid down in these cases have been materially altered by the decision of the House of Lords in the subsequent case of *Hamilton v. Watson* (²), or by that of the Court of Exchequer in the *North British Insurance Co. v. Lloyd* (³). In the former case the principle above mentioned was not denied, but the question that arose was as to its application to the facts of that particular case, and Lord Campbell states that the criterion for the necessity of voluntarily disclosing any particular fact in cases of this kind may be, whether the fact not communicated was one that could "not naturally be expected to have taken place between the parties who are concerned in the transaction." In *North British Insurance Co. v. Lloyd* (³), the Court of Exchequer held that the rule as to the effect of concealment in marine insurance cases, did not apply to contracts of suretyship, and that in the latter cases the concealment must be fraudulent in order to avoid the contract. In *Lee v. Jones* (⁴), the majority of the judges in the Exchequer Chamber held that a concealment by the creditor — that at the time of the contract the principal debtor was already indebted to the creditor in a considerable amount, of which the surety was ignorant — was evidence to go to the jury of such a fraud on the surety as would discharge him from liability. It must depend (as observed by Blackburn, J., in the case last cited) "upon the nature of the transaction in every case, whether the fact not disclosed is such that it is impliedly represented not to exist." We cannot doubt but that previous acts of dishonesty by the servant in the same service, known to the master, would be such a fact, and if concealed from the surety *would avoid the contract: vide Story's Equity Jurispru- [674 dence, vol. i, ss. 215 and 324.

If, therefore, it is correct, as we think it is, on these authori-

(¹) 1 Dow., 272.

(²) 13 Cl. & F., 109.

(³) 10 Ex., 523; 24 L. J. (Ex.), 14.

(⁴) 17 C. B. (N.S.), 492, 506; 34 L. J.

(C.P.), 131.

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ties, to say that such a concealment as is here pleaded, if it had been practised at the time when the contract was first entered into, would have discharged the surety, we think that in the case of a continuing guarantee a similar concealment made during the progress of the contract ought to have a similar effect as regards the future liability of the surety, unless his assent has been obtained, after knowledge of the dishonesty, that his guarantee should hold good during the subsequent service. One of the reasons usually given for holding that such a concealment as we are here considering would discharge the surety from his obligations, is, that it is only reasonable to suppose that such a fact if known to him must necessarily have influenced his judgment as to whether he would enter into the contract or not; and in the same manner it seems to us equally reasonable to suppose that it never could have entered into the contemplation of the parties that, that after the servant's dishonesty in the service had been discovered, the guarantee should continue to apply to his future conduct, when the master chose for his own purpose to continue the servant in his employ without the knowledge or assent of the surety. If the obligation of the surety is continuing, we think the obligation of the creditor is equally so, and that the representation and understanding on which the contract was originally founded continue to apply to it during its continuance and until its termination.

If the guarantee at its inception was founded, as suggested, by Lord Eldon in *Smith v. Bank of Scotland* ⁽¹⁾ on the trustworthiness of the servant, so far as that was known to both parties, as soon as his dishonesty is discovered and becomes known to the master, the whole foundation for the continuance of the contract as regards the surety fails; and it seems to us in accordance with the plainest principles of equity and fair dealing, that the master should, on making such discovery, either dismiss the servant, or, if he chooses to continue him in his employ without the knowledge or assent of the surety, that he must himself [675] stand the risk of loss arising from any future dishonesty. "It is the clearest and most evident equity" (says Lord Loughborough, in *Rees v. Berrington* ⁽²⁾) "not to carry on any transactions without the knowledge of him (the surety) who must necessarily have a concern in every transaction with the principal debtor. You cannot keep him bound and transact his affairs (for they are as much his as your own), without consulting him. You must let him judge whether he will give that indulgence contrary to the nature of his engagement." Thus in the present case, the conduct of the master in retaining the servant in this employ, when he might have discharged him for

(1) 1 Dow., 272, 273.

(2) 2 Ves., 540, 543.

dishonesty, seems, in the words of Lord Loughborough, an indulgence granted to the servant without the assent of the surety, and contrary to the nature of his engagement. The time at which the surety will be discharged from further liability in cases of this kind will vary according to the circumstances of each case; but we intend our judgment to apply only to cases like the one now before the Court, where the master, having the power of at once discharging the servant for dishonesty, deliberately continues him in his service, after he becomes aware of the dishonesty and without the assent or knowledge of the surety.

No case directly in point, either in favor of this plea or against it, has been cited before us. In *Peel v. Tutlock* ⁽¹⁾ a question arose how far the concealment of the servant's embezzlement for three years after the termination of the service would affect the liability of the surety. No decision was, however, given on that point, and the case contains only a dictum of Eyre, C.J., that an industrious (by which we presume he meant an intentional or fraudulent) concealment might have an effect on the liability of the guarantor. In *Smith v. Bank of Scotland* ⁽²⁾, there is an observation of Lord Redesdale made in the course of the argument, which has a closer bearing on the present question. In that case Paterson, the bank agent, seems to have given security to the bank, apparently at the commencement of his service: afterwards, and while the service continued, and after his accounts had been inspected and reported on by an officer of the bank, he was called on to give additional security, and Smith, the appellant, *gave a bond as such additional se- [676] curity. Smith raised an action of reduction of this bond, and in that action insisted on his right to inspect the above report of the officer of the bank. On this Lord Redesdale observed, "Supposing the report showed that Paterson was no longer trustworthy, and the bank had trusted him notwithstanding, upon decided cases the prior security would be discharged from all the consequences of subsequent transactions as contrary to the faith of the contract. And then it might be a question what bearing this circumstance might have on the new sureties." The cases to which Lord Redesdale alludes are not mentioned, but it seems pretty clearly to have been his opinion that if the master discovers the dishonesty of his servant during the service, and afterwards continues to trust him notwithstanding, the surety for the servant would be discharged from all liability for subsequent losses. In the case of *Shepard v. Beecher* ⁽³⁾ before Lord Chancellor King, a father, on binding his son apprentice,

⁽¹⁾ 1 B. & P., 419, 423; and see p. 421.

⁽²⁾ 1 Dow, at p. 287.

⁽³⁾ 2 P. Wms., 288, 290.

gave a bond for his fidelity. Some years afterwards the apprentice embezzled 200*l.* of the master's money, of which the master gave notice to the father, and demanded the money. The father paid the amount, but sent a letter requesting the master not to trust the apprentice with cash in future, or at least to do so very sparingly. The apprentice continued afterwards with the master for several years, and committed further embezzlement of which the father had no notice until two years after the expiration of the apprenticeship, when the bond was put in suit. The Lord Chancellor held that the father continued bound, stating apparently as the ground of his judgment, "that the father ought not to have satisfied himself with sending the letter and taking no further care of the matter, but should have endeavored to make some end with the master, and to have got up the bond." This decision seems to us to rest on the fact that the father, instead of taking measures to have the bond delivered up, as he might have done, assented to continue bound after he had notice of the first embezzlement, and that the other embezzlements were not actually ascertained until after the expiration of the apprenticeship.

It is well established that a surety, after he has been discharged from his contract by the act of the creditor, may revive his [677] *liability by a subsequent promise or assent: *Mayhew v. Crickell* (1); *Smith v. Winter* (2). In the present plea it is alleged as a conclusion of law that, by reason of the concealment, the defendant was prevented from revoking the guarantee and compelling Smith to pay the money for which the defendant was liable. The discharge of the surety in the present case seems to us to arise rather out of the nature and equity of the contract between the parties, than upon any assumed right of revocation. We think the surety is discharged unless he assents or agrees, after he has had knowledge of the dishonesty, that the guarantee shall hold good for the subsequent service; but, as a revocation of the guarantee as soon as the dishonesty has come to his knowledge will be the best evidence of dissent, whether his discharge from the contract is founded on express revocation, or want of assent after notice of the dishonesty, seems rather a question of words than of substance.

In *Parsons on Contracts*, vol. ii. p. 31, the rule as to the right to revoke a guarantee like the present is thus stated: "If the guarantee be to indemnify for misconduct of an officer or servant, the promise is revokable, provided the circumstances are such, that when it is revoked, the promisee may dismiss the servant without injury to himself on his failure to provide new and adequate sureties." No judicial authority is cited in sup-

(1) 2 Swan., 185.

(2) 4 M. & W., 454.

port of this proposition, and therefore it can only be cited as the opinion of the writer. It will be seen that he confines the right of the surety to revoke his guarantee to those cases where the master may, on the revocation being made, dismiss the servant without injury to himself. The present case is distinctly within the limitation, and there can be no doubt but that the right of the master at once to discharge the servant on discovering his dishonesty, and so place himself in statu quo, is a most material ingredient in the consideration of the question.

Since the argument of this case, the judgment of Malins, V.C., in *Burgess v. Eve* (1) has been published. The chief question in that case was whether the contract before the Court was or was not a continuing guarantee, but in the course of his judgment the Vice Chancellor expresses an opinion which directly applies to the *present case. "My opinion is" (he says), "and [678 I have no hesitation in expressing it, that a person who gives a guarantee would have a right to say to the person taking it, 'You will continue at your own peril to employ the person on whose behalf I gave the guarantee;' provided that the clerk or other person has been guilty of embezzlement or gross misconduct, or has turned out to be unworthy of the confidence reposed in him by the persons giving that guarantee for him. If the employer under such circumstances refused to give the guarantee up, the person giving it would have a right to file a bill in this court, and in my opinion would succeed in the contest, because the Court would direct the bond to be delivered up to be cancelled." And the same opinion is repeated in other parts of his judgment. It may be said that this opinion was not necessary for the decision of the case before the Vice Chancellor, and is not therefore a binding authority. That may be so, but the opinion seems to us to be founded on equity and good sense, and as such we adopt it as directly applicable to the case now before us. For these reasons we think that the plea is good, and that the defendant is entitled to our judgment.

BLACKBURN, J. This was a demurrer to a plea which was argued before my Lord and my brothers Lush, Quain, and myself in last term, the decision of which involves a question of some difficulty. I have with some hesitation come to the same conclusion as the rest of the Court, but as I do not quite agree in all the reasons given by them, I prefer stating my own reasons.

The declaration is on a contract of guarantee to the plaintiff to an amount not exceeding 50*l.*, as surety for one Smith during the course and continuance of his employment by the plaintiff. I must first observe that I think on this declaration the defendant must be taken to have agreed to be surety during the em-

(1) Law Rep., 13 Eq., 450, 458.

ployment, and cannot withdraw from his guarantee, unless something new occurs to give him that right.

The defendant pays money into court to cover Smith's defalcations up to a particular date, viz., the 20th of November, 1869; and as to the defalcations subsequent to that date pleads, on equitable grounds, that on that date the plaintiff became aware that Smith had embezzled moneys for which the defendant was [679] responsible, *that she, without informing the defendant of this, allowed Smith to continue in her service, and to pay off the amount of his defalcation, and that the defendant was wholly ignorant of Smith's guilt. The plea then states, as conclusions of law, that owing to the non-disclosure of this fact by the plaintiff, the defendant was prevented from immediately revoking his guarantee, and in consequence is in equity discharged.

I think that the first question to be considered is, what would be the right of the surety on being informed that the servant had committed a fraud; for, if his knowledge of that fact would have given him no rights, the concealment could not prejudice him. I still adhere to the opinion that I expressed in *Lee v. Jones* (¹), that if such a transaction as is alleged in the plea had taken place before the defendant entered into the contract of suretyship, and had been concealed from him, it would have furnished evidence of a false representation to the surety that no such thing existed, made by the plaintiff to the surety for the purpose of inducing him to enter into the contract of suretyship, and would therefore afford evidence in support of a plea of fraud. Further than this I am not prepared at present to go, and it is to be remembered that a minority in the Exchequer Chamber refused to go so far. Still I act on that as being established law; but I cannot concur in the conclusion from these premises that therefore there is a condition implied by law on every contract of suretyship for a servant that it shall become void if the servant afterwards commits a fraud, and the principal on hearing of it does not inform the surety of it. It is quite clear that misconduct of the servant does not alone put an end to the contract, for the very object of the suretyship is to afford protection against the misconduct of the person whose good conduct is guaranteed. And I find no authority for saying that there is such an implied condition. *Shepherd v. Beecher* (²) is a distinct authority that even in equity the effect is at most to render the contract voidable at the option of the surety: for it was there decided that the father, who, on becoming aware of the misconduct of his son for whom he was surety, took no steps to get rid of the suretyship, remained liable.

[680] *But there is a ground on which I think he may have a ground for being discharged in equity, which I will now state.

(¹) 17 C. B. (N.S.), 507; 34 L. J. (C.P.), 131.

(²) 2 P. Wms., 288.

A surety, as soon as his principal makes default, has a right in equity to require the creditor to use for his benefit all his remedies against the debtor; and as a consequence, if the creditor has by any act of his, deprived the surety of the benefit of any of those remedies, the surety is discharged. The authorities for this, as far as known to me, are collected in the judgment to *Bailey v. Edwards* ⁽¹⁾, and this equitable principle has, at least in the case where time has been given to the principal without the consent of the surety, been adopted to some extent at least, although whether to its full extent has been doubted: see *Pooley v. Harradine* ⁽²⁾. But it is not now material to decide that. Now the law gives the master the right to terminate the employment of a servant on his discovering that the servant is guilty of fraud. He is not bound to dismiss him, and if he elects, after knowledge of the fraud, to continue him in his service, he cannot at any subsequent time dismiss him on account of that which he has waived or condoned. This right the master may use for his own protection. If this right to terminate the employment is one of those remedies which the surety has a right to require to have exercised for the surety's protection, it seems to follow that, by waiving the forfeiture and continuing the employment without consulting the surety, the principal has discharged him. It never has been determined, as far as I can find, in any case in equity, that the surety has this right. There are dicta tending that way. In *Shepherd v. Beecher* ⁽³⁾ Lord Chancellor King says the surety "ought not to have satisfied himself with sending the letter, but should have endeavored to have made some end with the master, and to have got up the bond"—expressions which seem to show that the Lord Chancellor thought he might have got up the bond. In *Smith v. Bank of Scotland* ⁽⁴⁾ Lord Redesdale is reported to have said during the argument, when considering whether the appellants had, according to the law of Scotland, a right to inspect a report from the agent of the bank to the directors, "Supposing *the report showed that Paterson" (the person for whom [631 the appellants became sureties) "was no longer trustworthy, and the bank had trusted him notwithstanding, upon decided cases the prior security would be discharged from all the consequences of subsequent transactions, as contrary to the faith of the contract." But no such decided cases are now to be found, and the dictum is not again noticed in the judgments either of Lord Eldon or Lord Redesdale. No other authority was cited during the argument, nor, as far as we are aware, was there any then in print. And at the close of the argument I was much inclined to say that no such equity was established.

⁽¹⁾ 4 B. & S., 770; 34 L. J. (Q.B.), 41.

⁽²⁾ 2 P. Wms., at p. 289.

⁽³⁾ 7 E. & B., 481; 26 L. J. (Q.B.), 156

⁽⁴⁾ 1 Dow, at p. 287.

But, singularly enough, the case of *Burgess v. Eve* ⁽¹⁾ has been printed since the argument, and there Malins, V.C., says: "But if there is misconduct on the part of the person whose fidelity is guaranteed, for instance, if a man guarantees that a collecting clerk shall duly account for all moneys received by him, and that a collecting clerk is found to have embezzled his employer's money, reason requires that the man who entered into the guarantee because he believed the person to be of good character, when he finds he is not so, and not to be trusted, should have the power of saying 'I now withdraw the guarantee I gave you; I give you full notice not to trust him any more.' Notwithstanding all that has been said, I am clearly of opinion that a person who has entered into such a guarantee, and who is therefore responsible for the person whose fidelity is guaranteed, has a right to withdraw from that guarantee when that person has been proved guilty of dishonesty." He afterwards proceeds: "My opinion is—and I have no hesitation in expressing it—that a person who gives a guarantee would have a right to say to the person taking it, 'You will continue at your own peril to employ the person on whose behalf I gave the guarantee,' provided that the clerk or other person has been guilty of embezzlement or gross misconduct, or has turned out to be unworthy of the confidence reposed in him by the person giving the guarantee for him. If the employer under such circumstances refused to give the guarantee up, the person giving it would have a right to file a bill in this court, and in my [682] opinion would succeed in the contest, because *the Court would direct the bond to be delivered up to be cancelled. And I think that is only what good sense, propriety, and fair dealing between man and man would dictate." These expressions are singularly closely in point; they, though by no means irrelevant to the point then before the Vice-Chancellor, were not part of his decision. What he says is not therefore, perhaps, strictly binding upon us as a decision would be. But it seems to me consistent with justice; and without determining whether we should have ventured to lay down such an equity ourselves, I think we should follow the opinion of the Vice-Chancellor on a subject with which he is so much more conversant than we are. I therefore agree on this ground, and on this ground only, that judgment should be given for the defendant.

Judgment for the defendant.

Attorneys for plaintiff: *Travers, Smith, & De Gex.*

Attorneys for defendant: *Merriman, Powell, & Co.*

⁽¹⁾ Law Rep., 13 Eq., 450, 457.

See 1 Story's Eq. Jur., § 325a.; *Dawson v. Lewis, Kay*, 280. the defendants were sureties for repayment, by weekly installments, of money

In *Price v. Pool*, 8 Hurl. & Colt, 437, borrowed by P. of a loan society. One

of the rules of the society provided that if any member becomes more than four weeks payment in arrear, the committee shall immediately inform the sureties of the same, and have power to institute legal proceedings against them." P. died leaving more than four weeks payment in arrear, but no application was made to his sureties until more than two years afterwards. Held,

that the rule was no part of the contract between the society and the sureties, and that the omission to give notice in pursuance of it did not afford an equitable defence to an action against the sureties. This case went upon the ground that, mere delay by the creditor in notifying the sureties of non-payment by the principal according to the terms of the contract did not discharge them.

June 10, 1872.

***JONES and another v. THE NEPTUNE MARINE INSURANCE [702
COMPANY.**

[Law Reports, 7 Queens Bench, 702.]

Marine Insurance—Construction of Policy on Freight—"From B. Island to Port of Discharge, the Insurance on said Freight beginning from the loading of said Vessel."

The plaintiffs caused themselves to be insured with the defendants, "lost or not lost, in 500*l*., upon the freight payable to them in respect of this present voyage to be performed by the vessel *Napier* from Baker's Island to a port of discharge in the United Kingdom, the insurance on the said freight beginning from the loading of the said vessel. Being a reinsurance to be paid as on original policy." The plaintiffs had underwritten a policy on chartered freight of a cargo of guano, from Baker's Island, while there, and thence to a port in England. The vessel arrived at Baker's Island, and had taken in two-thirds of her cargo, a full cargo being ready, when she was wrecked. The plaintiffs, having paid upon a total loss, sought to recover it from defendants:

Held, that the risk had not attached.

By Blackburn J., on the ground that the clause, "the insurance on the said freight beginning from the loading of the said vessel," did not extend the insurance beyond the other part, "from Baker's Island," but only showed that defendants did not intend to be liable unless the goods were on board.

By Mellor and Lush, JJ., on the ground, that the latter words did extend the previous clause and made the risk begin earlier, but that "from the loading" meant from the completion of the loading.

DECLARATION on a policy of insurance of the 21st of February, 1871, effected by plaintiffs' agents with defendants. The material parts of the policy were: That the agents, for themselves and all concerned, had caused themselves to be insured with defendants, "lost or not lost, in the sum of 500*l*., upon the freight payable to him or them in respect of this present voyage to be performed between as below, by the vessel *Napier* from Baker's Island to a port of call ^{and} or discharge in the United Kingdom, the insurance on the said freight beginning from the loading of the said vessel, and terminating when the said vessel shall be moored as above at a safe anchorage. . . . The said freight for the purposes of this insurance is hereby declared to be valued at the actual amount payable to the insured by the charterer of the vessel for the above voyage." The perils were the usual perils; and in the margin was "Being a reinsurance to pay as

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Jones v. Neptune Marine Insurance Co.

703] may be paid on original *policy (1)." That certain goods at Baker's Island were loaded on board the said ship to be carried therein for freight, and other goods were there and then ready to be shipped, and would have been loaded but for the loss after mentioned, and afterwards and during the continuance of the risk the ship by perils insured against became lost and rendered incapable of conveying the said goods upon the said voyage, whereby the freight was wholly lost, and plaintiffs were obliged and did pay the 500*l.* on the original policy: allegations of all conditions precedent. Claim 500*l.*

Pleas: 1. That the policy was not effected as alleged. 2. That at the time of the alleged loss the ship had not been loaded within the meaning of the policy, nor had the insurance on the freight begun as alleged.

Issue joined.

At the trial, before Blackburn, J., at the Liverpool Winter Assizes, 1871, it was proved that a charter of the 22d of August, 1870, was entered into between Wolf & Co., owners of the ship *Napier*, now on her passage to Melbourne, and the American Guano Company, by which it was agreed that the vessel should proceed on a voyage from the port of Melbourne, Australia, to Baker's Island, in the Pacific Ocean, and there load a cargo of guano. The charterers agreed to supply a full cargo of guano; and the owners agreed that when the vessel was properly loaded the captain should give bills of lading stating the quantity loaded, and then the vessel should proceed on her return passage to Birkenhead; and the charterers agreed to pay freight at 70*s.* per ton, each ton properly discharged and delivered, one quarter in cash within five days after arrival at her port of discharge, and the balance in cash upon the proper delivery of the cargo as per charter. . . .

The plaintiffs had underwritten a policy "in 500*l.* lost or not lost, at and from Melbourne to Baker's Island, while there, and thence to Liverpool or Birkenhead, upon any goods on board the vessel *Napier*," declared to be on "chartered freight valued at 6000*l.*" The plaintiffs having underwritten this policy caused themselves to be reinsured with the defendants by the policy of 704] *the 21st of February, 1871, in the terms set out in the declaration.

The ship reached Baker's Island on the 1st of April, 1871 and had taken in about two-thirds of her cargo of guano, a full cargo being ready, when she was obliged through stress of weather to leave her moorings, the anchorage being in an open roadstead; and she afterwards struck on a reef and became a

(1) The policy was partly printed and partly in writing: see the judgment of Blackburn, J., post, p. 707.

total wreck. The plaintiffs having paid 500*l.* on their policy, sought to recover it from the defendants.

A verdict passed for the plaintiffs for the whole amount claimed, with leave to the defendants to move to enter the verdict for them, or to reduce the verdict.

A rule was accordingly obtained to enter a verdict for defendants, on the ground that the risk had not attached; or to reduce the verdict to 250*l.*, or such other sum as the Court shall think fit, on the ground that the defendants were only liable to a loss in proportion to the freight on cargo actually loaded.

Butt, Q.C., and *Trevelyan*, showed cause. The risk under the defendants' policy had attached. The first clause, "500*l.* on freight payable on the voyage to be performed by the ship *Napier* from Baker's Island to a port of discharge in the United Kingdom," is only a description of the subject insured, viz., chartered freight on the above voyage; add the risk is defined by the subsequent clause, "the insurance beginning from the loading of the said vessel." Insurance, being a contract of indemnity, is always to be construed in favor of the assured, as most consonant with the intention of the parties: 1 *Duer on Insurance*, p. 161. And, as on an insurance on freight all that is generally necessary is that the ship should be on the voyage, and the goods ready at the port for shipping: *Phillips on Insurance*, ss. 944-5, the words "the insurance beginning from the loading" must be interpreted to mean, that in order that the insurance may attach the loading must have commenced; and, inasmuch as the ship was partly loaded and the rest of the cargo was ready, the plaintiffs are entitled to recover the full amount. [They referred to *Foley v. United Fire Insurance Co.* (1); *Beckett v. West of England Marine Insurance Co.* (2); *Mel-* [705 *lish v. Allnutt* (3); *Richards v. Marine Insurance Co.* (4); *Hunter v. Leathley* (5).

[*BLACKBURN*, J., referred to *Bell v. Hobson* (6).]

Manisty, Q.C., and *Aspinall*, Q.C. (*R. G. Williams* with them), in support of the rule. All the cases cited are distinguishable. The insurance is of a voyage "from Baker's Island," and not "at and from," as is usually inserted in insurances on freight; the word "at" was omitted on purpose to avoid the danger of the open roadstead at Baker's Island. Inasmuch, therefore, as the insurance is only "from" Baker's Island, the words "the insurance beginning from the loading of the vessel," which more specifically define the point of time at which the risk is to commence, must mean the completion of the loading. Moreover

(1) *Law Rep.*, 5 C. P., 155.

(4) 3 *Johns. U. S. Rep.*, 307.

(2) 25 *L. T. (N.S.)*, 739.

(5) 19 *B. & C.*, 858.

(3) 2 *M. & S.*, 106.

(6) 16 *East.*, 240.

the expression is "the loading of the vessel," not "of the goods;" and a vessel cannot be said to be "loaded" until the loading is complete. Therefore, as the vessel was only partly loaded the policy had not attached, and the rule must be absolute to enter a verdict for the defendants.

BLACKBURN. We are all agreed that the rule must be absolute to enter a verdict for the defendants; but, I believe, we are not quite agreed upon our reasons. I will proceed to state the reasons which induce me to come to the conclusion I do. This is a reinsurance on chartered freight; the original voyage of the ship was from Melbourne to Baker's Island, and thence to the port of discharge in the United Kingdom. There was of course in the charter the ordinary covenant to furnish a full cargo, and the freight was to be paid according to what was the quantity of cargo delivered at the end of the voyage, more or less according to the goods delivered. The ship sailed on this voyage, and she was insured from Melbourne to Baker's Island, during her stay there, and thence to a port in the United Kingdom. It was during her stay at Baker's Island that the disaster occurred. The underwriters on the original policy got the defendants to execute a reinsurance, on which latter policy the 706] present question arises. *The object of the reinsurance was of course to cover a portion of the risk which the plaintiffs had undertaken, and the question is what portion of the risk have the defendants undertaken by the policy which they have entered into?

The policy is a peculiar policy. It is not one of the ordinary Lombard street, or Lloyd's policies, which have been modified of late; but it is an entirely new form of policy from beginning to end, and is applicable to freight only. That being so, we must consider what the ordinary policy of insurance is. In every case where there is an insurance against a marine loss, the undertaking of the underwriter is, I will be responsible for such accidents as happen to the subject matter of the insurance during some particular voyage, which is described in the policy. The question here is what is that voyage? An ordinary Lombard street policy is a very inartificial document, it is very old and long established, and it has acquired a meaning, which it was very difficult to put on it at first, but which has now been long established; and it is in a form that is made applicable in the first instance to goods, merchandise, tackle of ship, &c., it then mentions the voyage, and then come the further words, "beginning the adventure upon the said goods and merchandise from the loading thereof on board the said ship;" and then there is a blank, which is generally filled up with the words "at as above, and shall continue and endure until," and so on. And

then is inserted the value, and sometimes the real subject matter of insurance, as here chartered freight. In that form of policy nothing whatever is said, but the voyage is always understood to refer to the time when the risk is to commence on the freight; and the consequence of that construction of the policy is, that the underwriters are to be responsible, if the insurance be on goods, only when they are loaded on board the ship at the place named; if the insurance be on the ship, then from the time the voyage begins; though this depends upon how the policy may have been filled up; but as to the freight, where nothing is specified, the construction put upon the policy, as I understand it, is this: if the freight be in existence, as by the goods being ready to be loaded at the port named, and a peril happens which destroys the ship during the period of the specific voyage over which the policy is intended to apply, then *the underwriters are [707] responsible for the loss of freight, although the goods be not put on board; it is enough to prove it to have been in existence and that it does not rest in mere expectancy and possibility. Taking that to be the view of the matter, the question we have to decide on this policy is, in the first place, what is the voyage during which the underwriters undertook to be responsible for any damage arising to this freight from perils insured against; and, secondly, we have to see at what period of it the freight would be in such a state and condition that if the peril happens the freight is capable of sustaining damage from it. The policy is worded in this peculiar way: It begins thus, the insured "cause themselves to be insured in the sum of 500*l.* on the freight payable to him or them in respect of the present voyage to be performed," that being printed ⁽¹⁾; then comes in writing, "by the vessel *Napier*, from Baker's Island to any port of call ^{and} _{or} discharge in the United Kingdom." Then come printed words again, the insurance on the said freight beginning from the loading of the said vessel, and terminating when the said vessel shall be moored as above at a safe anchorage." Construing that as best I can, I think it amounts to this: the underwriters say, "we will be responsible for any damage in consequence of any peril that may happen during the voyage from Baker's Island to a port of discharge in the United Kingdom;" but I look in vain for words in that part of the policy which say, "or during her stay at Baker's Island." These words might easily have been inserted had the parties intended to undertake that risk; but they are not there. The argument that most struck me for the plaintiffs was, that the printed words which are intended to apply to all cases are, "the insurance on the said freight beginning from the loading of the said vessel," &c., and

(1) The original policy was handed to the Court.

of course the goods were intended to be loaded before the voyage began, because they could not be loaded during the voyage from Baker's Island to the United Kingdom. If I understand Mr. Butt's argument, it comes to this, the printed words show the risk was to commence earlier than the voyage described by the written words, that is, it was to commence during the vessel's stay at Baker's Island, as soon as goods were loaded; and 708] that would raise the other question as to the *amount, whether it meant the whole or a partial loading. That being the argument for the plaintiffs, can any effect be given to it? I come to the conclusion that that is not the true construction of this policy. I think it means, instead of leaving it at large, so as to leave it open to say that the freight existed, the goods being ready though not loaded,—“we will be responsible for any peril that happens during the voyage described, but we will not be responsible for the freight and insurance upon it unless the goods are actually on board.” I take it the printed words are not an extension of the risk backwards so as to make it commence before the voyage begins, but are a general limitation of the insurance as to all freight, “we will not be responsible unless the goods are on board.” This is the view I take: We will be responsible for damage to the freight, if the goods are put on board, during the voyage from Baker's Island to the United Kingdom.” The loss in the present case happened before the voyage from Baker's Island to the United Kingdom had commenced; and in the above view it is not covered by the policy, and consequently the defendants are entitled to the verdict. In this view it becomes unnecessary to express any decided opinion upon what was much argued, on the supposition that the printed words implied that the freight should be covered during some part, at all events, of the ship's stay at Baker's Island, whether or not it was necessary that the ship should be completely loaded before the risk attached. My present impression, without saying more, is, that, inasmuch as the freight payable would depend on the quantity of goods ultimately delivered, if a portion of the cargo had been shipped there would have been a covered only of freight at risk, the other portions would not be covered; and consequently the amount of insurance would be apportionable. I do not decide the point; but only express my present impression on that question. The ground I decide upon is, that I think the words of this policy express the intention of the underwriters not to be liable for perils that happen before the voyage from Baker's Island to the United Kingdom had commenced.

MELLOR, J. I have come to the same result as my brother Blackburn, although I differ in some respect from the view he

*takes, and this I do with the greatest possible hesitation ; [709 but I cannot quite yield to all the reasons he has given. This is a reinsurance of a part of a risk ; and the words are, not “at and from Baker’s Island,” but from Baker’s Island to a port of call or discharge in the United Kingdom ; the insurance on the said freight beginning from the loading of the said vessel, and terminating when the said vessel shall be moored at safe anchorage.” I cannot but think the written words—there being no “at” but only “from”—if they stood alone, would have the meaning my brother Blackburn ascribes to them : they would only cover the risk from the time of the sailing of the vessel from Baker’s Island to the United Kingdom. But then follow words to which I cannot give any meaning satisfactory to myself unless by saying they extend the risk further “backwards,” as my brother Blackburn expressed it. The printed words are, “the insurance on the said freight beginning from the loading of the said vessel.” Those words would not, I think, be satisfied by applying them to the state in which the loading was, so as to make the whole insurance begin when there had been a partial loading of the vessel ; but I cannot but think they do extend the risk so far as to make it commence on the completion of the loading of the vessel ; and this, as it appears to me, is not inconsistent with the words, “from Baker’s Island to a port of the United Kingdom.” And the policy must be read as if it had been “from the loading of the vessel at Baker’s Island to the United Kingdom.” That is the view I take of the policy, which, as I have said, I express with the greatest deference for the opinion of my brother Blackburn.

LUSH, J. I am also of opinion that the verdict ought to be for the defendants ; but I arrive at that conclusion for reasons different from those which my brother Blackburn has expressed ; and, although that difference is not material in this case, yet it may be material in other proceedings on the same form of policy. In my view, the words descriptive of the voyage were not intended to define the risk. They are, “lost or not lost, in the sum of 500*l*. upon the freight payable to him or them in respect of the present voyage to be performed as below, by the vessel *Napier*, from Baker’s Island to a port of call ^{and} discharge in the *United Kingdom.” Those words, in my view, are [710 descriptive of the subject of insurance, namely, the freight which is to be earned on the voyage described, and are not intended to define when the risk was to commence. Nevertheless, if there had been no other words defining the period when the risk was to commence, the risk, by implication, would only commence when the voyage commenced, and until the vessel had sailed on that voyage the policy would not have attached.

Then come the words which are expressly put in to define the commencement of the risk, which had not, in my view, been defined before; and they are, "the insurance on the said freight beginning from the loading of the said vessel." I can only read those words as qualifying or rebutting the inference which would have been drawn from the previous description of the voyage, and as making the underwriters liable from the time when the vessel is loaded: that is, that they would be liable although the voyage had not commenced, if the vessel had been loaded. Then what does that loading mean? Does it mean at the commencement or the completion of the loading? In the present case the loading had been partially accomplished, not completed; the vessel perished before the cargo was all put on board. If those words mean the insurance beginning from the commencement of the loading, then, in my view, the plaintiffs would be entitled to the whole amount, because there would have been a total loss; for although all the cargo was not on board, all the cargo necessary to complete the loading was ready to be put on board, and would have been put on board had not the vessel been rendered unable to receive it by one of the perils insured against. If the words had been "beginning the insurance from the commencement of the loading," then the plaintiffs would have been entitled to the full amount they claim. But I am of opinion that the words "from the loading of the vessel" do not mean that. I take into account that the underwriters, *prima facie*, do not intend to be responsible for the freight during the time the vessel lay at Baker's Island, because the ordinary words are omitted. The words are, not "at and from Baker's Island," but "from Baker's Island." Therefore the underwriters intended not to incur that liability which is ordinarily incurred in policies of this description, "at and from," but only to insure [711] the voyage; and the printed words, in my view, *must be read so as to qualify as little as possible the previous description of the voyage. Then, to what extent do they qualify it? According to my view, the only reasonable construction is that the defendants, in insuring that voyage, in effect say, "We are willing to become responsible from the time the vessel is loaded, that is, has taken in her full cargo and is ready to commence the voyage, although it shall not in fact have commenced." That reading appears to me to make the whole of the policy consistent; and, inasmuch as in this case the loading was not complete, the policy had not attached, and the plaintiffs can recover nothing. This disposes of the second branch of the rule, which was to reduce the verdict to the proportion due under the policy on the cargo actually put on board. It seems to me that the plaintiffs, on this policy, are entitled to all or nothing;

and for the reasons I have given I think they are entitled to nothing, on the ground that the policy had not attached.

Rule absolute to enter a verdict for the defendants.

Attorneys for plaintiffs: *Wynne, for Forshaw & Hawkins, Liverpool.*

Attorneys for defendants: *Cunliffe & Beaumont, for Woodburn & Pemberton, Liverpool.*

May 31, 1872.

*SMITH v. DARBY and others.

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[Law Reports, 7 Queen's Bench. 716].

Grant of Mines, Construction of — Right to let down surface.

Declaration for mining under the plaintiff's land without leaving proper support, whereby the foundations of plaintiff's mill and other buildings gave way, and the building fell. Plea, that S., the plaintiff's predecessor in title, was seized in fee of the said land, &c., and of the subjacent mines, and by an indenture of lease between S. and certain persons as lessees, S. demised for thirty-eight years, from the 25th of March, 1839, all the veins of minerals that should or might at any time be found or discovered under the said land, with full power to the lessees and assigns to get the minerals from the old pits, and sink fresh pits, they, the lessees and assigns, making reasonable satisfaction to the lessor and his tenants for the damage done to them respectively by the surface of the lands being covered with rubbish or otherwise injured, or as he or they might sustain, as well by the injury done to the lands in sinking and getting the mines and minerals, as for such damage or injury as might be done or caused in the dwelling houses or other buildings of the lessor, by getting the minerals under or near to any of the dwelling houses or other buildings according to the covenant thereafter contained for that purpose (to wit), in case any damage or injury during the term hereby granted shall happen to any of the dwelling houses, cottages, or other buildings, already erected, or to be hereafter erected on the land in lieu of the present buildings, and not of greater value than the present buildings were when erected, by reason of any minerals being got under them, or so near to them as to occasion such damage or injury, the lessees and assigns shall at their own cost, or six days' notice by the lessor or assigns, or his tenants, rebuild or repair any such buildings so damaged and injured, and put them in as good condition and repair as they were before the damage was done. And further, that the lessees and assigns shall every year during the term pay to the lessor, besides the immediate damage to be paid to the tenant, at the rate of 40s. an acre for the damage done to the crops, &c., for the first five years, and such a price as arbitrators shall determine as rent for each acre that shall be damaged, after which the lessees shall have free use of the land during the residue of the term. The plea concluded with an allegation that the defendants became assignees of the lease, and were always ready and willing to perform the covenant. On demurrer:

Held, that the plea was good: for that the terms of the lease were sufficient to show by implication that it was intended that the lessees of the mines should have the right to work the mine so as to undermine the surface, subject only to paying damages according to the covenants.

FIRST COUNT: That plaintiff was possessed of certain land, and defendants wrongfully and negligently excavated and worked certain mines under and adjacent to the said land, and dug for and got and took away coals, minerals, and earth out of the said mines without leaving proper or sufficient support for the said land, and *thereby the said land gave way and sank, and. [717

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Smith v. Darby.

the foundations of a certain mill and machinery, and the foundation of a certain cottage, and the foundations of other buildings erected on the said land and belonging to the plaintiff gave way and sank, and the walls of the said mill, cottage, and other buildings fell, and the said mill, machinery, cottage, and other buildings became prostrate and ruinous, and the said mill became broken and useless, and the plaintiff incurred great expenses in repairing the said mill, machinery, cottage, and buildings, and in endeavoring to maintain the same, and in repairing the said machinery, and also lost the use of the said land, mill, machinery, cottage, and buildings for a long time, and was unable to let the same, and the said land, mill, machinery, cottage and buildings, have been for a long time and are now of no use or value to the plaintiff, and thereby also a certain stream of water which then flowed over the said land to the said mill, and and was then used to supply water for working the same, was diverted from the said land, and the plaintiff has lost the use of the said water.

The second count was similar, alleging that plaintiff was possessed of certain land, and of a mill and a cottage and other buildings erected on it, and that there were certain foundations of and supporting the mill, cottage, and other buildings which plaintiff had of right enjoyed and ought to enjoy, &c.

The third count alleged that the plaintiff was entitled to have the said land, mill, cottage, and other buildings, and the said water supported by the soil, coal and minerals, under and adjacent to the said land, mill, cottage, and other buildings.

The fourth and fifth counts were similar to the first and third counts respectively, but alleged the possession to be in tenants and the reversion in plaintiff, and alleged damage to his reversion.

Third plea, to the first count, repeating the allegations in the tenth plea, and that the acts complained of were the lawful, proper, and reasonable getting by defendants of coals and minerals, out of the mines in the usual customary and proper manner, and without any wrongful act or negligence on part of defendants.

Tenth plea, to first, second, and third counts, that long before the committing of the grievances in those counts respectively mentioned, *and before the plaintiff became possessed of the said lands, mill, cottage, and other buildings (to wit), on the 25th of March, 1817, one R. Slaney, and one R. A. Slaney, were seized in fee of the land in those counts mentioned, and other land adjacent thereto, and of the mines under the same, being the mines in those counts respectively mentioned, and they, by indenture of the above date, and between them, as les-

sors of the one part, and certain persons, as lessees of the other part, did demise and lease unto the said lessees, for the term of thirty-eight years, from the 25th of March, 1839.

All, and all manner of veins and seams of coal, ironstone, and other stone and minerals of any manner or sort whatsoever that should or might at any time after the expiration of a certain therein recited lease of the 1st of April, 1779, be found or discovered in or under the said land, in those counts respectively mentioned, with full power, liberty, and authority for the said lessees, their executors, administrators and assigns, and their agents, colliers, servants, and workmen, to get the coal, ironstone, and other stone, and other minerals, out of all pits already sunk or open, and like power, liberty and authority for them, him, or her, to bore, dig, delve, and sink as many other pits as they should think necessary, and also to erect gins and engines, and to drive and make soughs, levels, and drains, or to amend and repair all such soughs, levels, and drains so to be made, and to amend and repair all such soughs, levels, and drains as were already made, which were out of repair and wanted amendment, and as often as the same should be out of repair and wanted amendment, and to do and cause to be done everything else that might be necessary and needful for the discovering and getting the said coals, ironstone, and other stone, and other minerals, and to place, stack, and lay such coal, ironstone, and other stone and mineral, and the rubbish and earth, by raising, digging for, and getting the said coals, ironstone, and minerals upon the enclosed lands, or waste lands, of the said lessors, from out or under which the mines and minerals thereby demised should be gotten, and full liberty, power, and authority for the said lessees, their executors, administrators, and assigns, to sell, use, and consume the said coal, ironstone, and other stone and minerals, and to convert the said coal, or such part thereof as they should think proper, into charcoal, they, the said lessees, their executors, administrators, and assigns, from and after the expiration of the said lease of the 1st of April, 1779, making reasonable satisfaction to the said lessors, their heirs and assigns, and their tenant and tenants, for the damage done to them respectively by the surface of their land being covered with rubbish or otherwise injured, or as he or they should or might sustain, as well by the injury done to the lands of the said lessors in sinking and getting the said mines and minerals, and converting coal into charcoal, as for such damage or injury as might be done or caused in the dwelling houses or other buildings of the said lessors, by getting mines of coal, ironstone, or other stone, or other minerals, under or near to any of the dwelling houses or other buildings of the said lessors, according to the covenant thereafter contained for that purpose.

Which said covenant was and is in the words following: [719

And, further, in case any damage or injury during the term hereby granted shall happen to any of the dwelling houses, cottages, or other buildings already erected, or to any dwelling houses, cottages, or buildings, to be hereafter erected on the estate of the lessors, in the parish of Dawley aforesaid, in lieu and stead of any of the present erections or buildings, and not of greater value than the present buildings were when erected, by reason of any coals, iron, stone, or other minerals, being got under them or any of them, or so near to them or any of them as to occasion such injury or damage, that then the said lessees, their executors, administrators, and assigns, shall and will at their own costs and charges, on six days' notice to them given by the lessors, or assigns, or their tenants, rebuild, repair, and find materials, and carriage of materials, for the building and repairing any such messuages, cottages, and other buildings so damaged and injured by the means aforesaid, and put and make such messuages, cottages, and other buildings, in as good state, condition, and repair, as they were before such injury or damage was done or happened to them respectively. And, further, that they the said lessees, their executors, administrators, and assigns, shall and will yearly and every year on the 25th of March in each year during the term hereby granted, well and truly pay or cause to be paid unto the said lessors and assigns, over and besides the immediate damage or injury occasioned to the stock or crops of the tenant or occupier of the lauds so to be damaged (which is to be paid for to the

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said tenant or occupier) a satisfaction for all damages and trespasses which shall be by them sustained, or which hereafter shall be done or committed by the said lessees, their executors, administrators, and assigns, agents, workmen, carriers, or colliers, by getting the said mines and minerals, after the rate of 40s. per acre per annum for and during the first five years from the commencement of such damage, and so in proportion for any greater or less quantity than an acre. And from and after the expiration of the said term of five years from the commencement of such damage shall and will well and truly pay or cause to be paid to the said lessors or assigns, such a price or value for the land so to be damaged as aforesaid as shall be fixed thereon by two indifferent persons, one to be chosen by each party, and in case such two persons shall not agree, then such a price as shall be fixed by such one person as the two persons so to be appointed as aforesaid shall name as their umpire, whose determination shall be final, the value of each acre of the said land prior to such damage done being reckoned by the arbitrators or umpire at 60s. per acre; and on payment of such sum as such arbitrators or their umpire shall so fix together with interest thereon, after the rate of 5l. per cent. per annum, after the expiration of the said term of five years, (when the said damage rent of 40s. per acre is wholly to cease), to the time of the actual payment of the said estimated damage, the said lessees shall have the free use, possession, and enjoyment of the land which shall be so damaged for the then residue of the said term of thirty-eight years or other further term to be granted as hereinafter mentioned, without paying any further consideration for the same by way of rent or otherwise howsoever.

And afterwards, and during the existence of the said term, all the estate and interest of the said lessees became vested in the defendants; and after the granting of the said term, and subject 720] *thereto, the plaintiff became possessed of the said land, mill, cottage, and other buildings in the said counts mentioned, and the defendants lawfully and properly worked the said mines under and according to the terms of the said indenture. That the damage or injury to the said land, mill, cottage, and other buildings of the plaintiff in the said counts respectively mentioned, happened and accrued by reason of the defendants so working the said mines, and not otherwise; and at the time of doing of the said acts by the defendants, and of the accruing of the said damage, they always were, and thence hitherto have been, ready and willing to perform the said covenant on their part and to have the amount of compensation to which the plaintiff might be entitled settled as by the said indenture provided, and to pay the same, as the plaintiff well knew

Eleventh plea, to the fourth and fifth counts, that after the granting of the said term, and subject thereto, the reversion in the land, mill, cottage, and other buildings, became vested in the plaintiff, and, except as aforesaid, repeating tenth plea.

Second replication to the third, tenth, and eleventh pleas, that divers of the said mill, cottage, and buildings in such counts mentioned are buildings erected since the making of the said lease, and were not erected in lieu or instead of any buildings erected on the said land at the time of the making of the said lease.

Third replication to the third, tenth, and eleventh pleas, that

the damage to which the pleas are pleaded arose and accrued in consequence and by reason of the defendants, after the erection of the said mill, machinery, cottage, and building, having excavated, gotten, and removed the said minerals under and near to the said lands without leaving proper and sufficient support in that behalf, and the said damage would not have happened or accrued if the defendants had left reasonable and proper support for the land.

Demurrers to the third, tenth, and eleventh pleas, on the ground, amongst others, that the alleged lease upon which they were based does not expressly or impliedly deprive the plaintiff of the right to have his land supported, and the covenants merely give a cumulative remedy.

Demurrers to the second and third replications, on the ground, *amongst others, that the defendants were authorized by [721] the lease to work the minerals without leaving support to the land and buildings.

Dowdeswell, Q.C. (*G. Shaw* with him), for the plaintiff. Nothing is better settled than that, when the surface and mines are in different owners, *primâ facie* the owner of the surface is entitled to the support of the subjacent strata; and it lies on the owner of the mines to show in derogation of this right a right granted to him of taking all the minerals without reference to the surface: *Harris v. Ryding* ⁽¹⁾; *Humphries v. Brogden* ⁽²⁾; *Smart v. Morton* ⁽³⁾; *Roberts v. Haines* ⁽⁴⁾; *Dugdale v. Robertson* ⁽⁵⁾; and most of those cases are instances in which the grant of the right to dig the minerals subject to paying compensation to the owner of the surface for injury to it, with a covenant by the mine owner to pay the compensation, was held insufficient to override the *primâ facie* right of the owner of the surface to support, and an action was held to lie notwithstanding by him. In *Harris v. Ryding* ⁽¹⁾, Parke, B., expressly says that such clauses give a cumulative remedy, and do not interfere with the common law remedy; see also per Williams, J., in *Berkley v. Shagto*. ⁽⁶⁾ In *Roubotham v. Wilson* ⁽⁷⁾, no doubt, it was held that the clause giving the power to dig and take the minerals was wide enough to override the *primâ facie* right of the owner of the surface; but there was an express covenant by the owners of the surface that the minerals might be worked by the grantees, without being liable to any action for damage by reason of the sinking of the surface from such working. Here the covenant is, not to pay damages, but to rebuild, which is no substitute for the com-

⁽¹⁾ 5 M. & W., 60.

7 E. & B., 625.

⁽²⁾ 12 Q.B., 739; 20 L. J. (Q.B.), 10.

⁽³⁾ 3 K. & J., 695.

⁽⁴⁾ 5 E. & B., 30; 24 L. J. (Q.B.), 260.

⁽⁵⁾ 15 C. B. (N.S.), 79, 92.

⁽⁶⁾ 6 E. & B., 643; 25 L. J. (Q.B.), 353;

⁽⁷⁾ 8 H. L. C., 343; 30 L. J. (Q.B.), 49.

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mon law right to damages. It is simply a positive covenant to pay certain damages in certain events, but there is no negation of the other rights of the owner of the soil. The second replication as to the injury being to houses newly built is good, for the owner of the surface is entitled to damages for the destruction of his houses, *notwithstanding they are modern, if the additional weight of them was not the cause of the subsidence: *Sroyan v. Knowles*.⁽¹⁾

Bosanquet, for the defendants. The decision and the judgment of Lord Wensleydale in *Rowbotham v. Wilson*⁽²⁾ are directly in favor of the defendants. The grant and covenants taken together show, by necessary implication, that the parties intended an absolute grant of all the mines and minerals, subject only to the payment of compensation limited and to be ascertained in the mode prescribed by the covenant; the plaintiff's remedy, if any, is therefore on the covenant. *Smart v. Morton*⁽³⁾ is the strongest case in favor of the plaintiff; but the terms of the present grant and covenant by the lessees are much larger than any in that case.

Dowdeswell, Q.C., in reply, pointed out that in *Rowbotham v. Wilson* the words construed to be an absolute grant were the words of the grantor; and he relied on the judgment of Parke, B., in *Harris v. Ryding*⁽⁴⁾.

BLACKBURN, J. I think that judgment must be for the defendants. There is no doubt about the rights of the grantee of minerals, and they cannot be more accurately stated than by Lord Wensleydale in *Rowbotham v. Wilson*⁽⁵⁾: "There is no doubt that, *primâ facie*, the owner of the surface is entitled to the surface itself and all below it, *ex jure naturæ*; and those who claim the property in the minerals below or any interest in them must do so by some grant from or conveyance by him, or, it may be, from the Crown, as suggested by Lord Campbell in the case of *Humphries v. Brogden*.⁽⁶⁾ The rights of the grantee to the minerals, by whomsoever granted, must depend upon the terms of the deed by which they are conveyed or reserved when the surface is conveyed. *Primâ facie*, it must be presumed that the minerals are to be enjoyed, and therefore that a power to get them must also be granted or reserved as a necessary incident. It is one of the cases put by Sheppard (*Touchstone*, 5 chap. p. 89) in illustration of the maxim '*Quando aliquid conceditur, conceditur etiam et id sine quo res ipsa non esse potuit*,' that by the grant of mines is granted the power to dig them. A similar presumption, *primâ facie*, arises that the

⁽¹⁾ 6 H. & N., 454; 30 L. J. (Ex.), 102.

⁽²⁾ 5 M. & W., at p. 72.

⁽³⁾ 8 H. L. C., 349, 360; 30 L. J. (Q.B.),

⁽⁴⁾ 8 H. L. C., at p. 360.

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⁽⁵⁾ 12 Q. B., 739; 20 L. J. (Q.B.), 10.

⁽⁶⁾ 5 E. & B., 30; 24 L. J. (Q.B.), 260.

owner of mines is not to injure the owner of the soil above by getting them, if it can be avoided. But it rarely happens that these mutual rights are not precisely ascertained and settled by the deed by which the right to the mines is acquired, and then the only question would be as to the construction of that deed, which may vary in each case." In that particular case there were difficulties under an Inclosure Act, and other points were raised. But the point which Lord Wensleydale said was sufficient to decide the matter was this: Pears, through whom the plaintiff claimed, had executed a deed, and whether he was the owner of the surface at the time or not, subsequently, at all events, the title accrued to him; and Lord Wensleydale says that the covenant in the deed would, by estoppel, be operative as a grant to take the minerals absolutely. The covenant was one in which the different parties who had taken the surface and the minerals very clearly expressed their intention that the minerals might be taken without making compensation for the surface sinking; and Lord Wensleydale says, "Pears would still be bound by the deed which he executed, which would operate as a grant of the right to win the coals in such a manner as might injure the superjacent land." (1) That case, being in the House of Lords, is binding upon us. *Prima facie*, it is to be taken, that where the minerals are granted the grantee is to take them in such a way as to leave sufficient support; but the question comes to be whether it sufficiently appears, upon the present deed, what the parties intended. It appears that, when this grant was made, there were houses and buildings on part of the land, and on part there were no houses and buildings. By the deed was granted, in general terms, full liberty to enter, and work, and take the minerals, with this important clause: "They, the lessees, their executors, administrators, and assigns, making reasonable satisfaction to the lessors, their heirs and assigns, and their tenant and tenants, for the damage done to them respectively by the surface of their lands being covered with rubbish or otherwise injured, or as he or they should or might sustain, as well by the injury done to the lands of the said lessors in sinking and getting the said *mines and [724] minerals and converting coal into charcoal, as for such damage or injury as might be done or caused in the dwelling houses or other buildings of the said lessors by getting mines of coal, iron-stone, or other stone or other minerals under or near to any of the dwelling houses or other buildings of the said lessors, according to the covenant thereafter contained." I quite agree with Mr. Dowdeswell that, *prima facie*, what would be meant by a deed which grants the ores and minerals would be a grant

(1) 8 H. L. C., at p. 364.

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to take them, but leaving sufficient support for the surface. But does not this deed say, "You may take them absolutely, only making compensation afterwards?" I cannot agree that there is any argument to be derived from the use of affirmative words only, without any negative words. The question is what was the intention of the parties to the deed, when there is an affirmative promise to pay money to the tenants, and what was the bargain as to the sale of the property. If the owner of a horse said, "You may take the horse," and the person to whom this was said had promised to give 20*l.* for it, there is no question that he could not be sued in an action of trespass for taking the horse, because the intention of the parties was that the one was to buy and the other sell the horse. So here the question is whether it appears upon the clauses in the deed that the intention of the parties was that the minerals should go absolutely, without any restriction as to the right of support; and if it appears that compensation must be paid for that in a particular way, it shows that the intention was that they should be so taken. I think it does here sufficiently appear that there was such an intention. The words I have already read go as far as this: They contemplate the getting the minerals under the houses, paying for such damage or injury as might be done or caused in the dwelling houses or other buildings of the lessors by getting the minerals under or near any of them. That, *primâ facie*, would mean: "You must pay compensation for taking the minerals under the houses and not leaving sufficient support." Then the covenant carries this still further. [The learned judge read the covenant.] On payment of the compensation awarded, the lessees are to have "the free use, possession, and enjoyment of the land which shall be so damaged for the then residue of the term." Taking these things together, it seems 725] to me to be plain that the *bargain of the parties was this: "You, the grantees, shall have the minerals, not, as is usually the case, to win them, leaving, as you would be, *primâ facie*, supposed to do, sufficient support for the surface; but you shall have them absolutely, without being obliged to leave the support, and if you do any damage by bringing down the surface, you shall pay for taking away the minerals without leaving support, in the way we afterwards provide," and the fact of the grantees affirmatively promising to make compensation to the grantors seems to say on the grantor's part, "We have sold you the right of support." This seems to me, therefore, as complete and good a bargain and sale as that of the horse; and it follows that the plaintiff has no other remedy than that given him by the covenant. Consequently the pleas are good, and the replications bad.

MELLOR, J. I am of the same opinion. The Messrs. Slaney were the owners both of the surface and of the mines. By the lease they separated the surface from the mines, in the fullest manner that such a power can be given. But I agree that, if there had been nothing else in the instrument to negative the presumption, it would have been open to the suggestion that the grant must be subject to the right of support to the surface; which is always presumed, unless an intention to the contrary appears, either expressly or by necessary implication. There is no doubt that the power conferred to work the mines in any manner and to get all the coal is very extensive. And the compensation for the damage, which it was contemplated by the parties might arise from the working, is to be made according to the covenant contained in the deed for that purpose; and in order to construe the grant and to ascertain whether or not the right of support was incident to it, or whether the intention was to dispense with it, we must look to the covenant, construing that and the grant together. I cannot but think that the intention of the parties may be thus expressed: "I grant you the absolute right to get all the coals, but certain damage may result; houses may be let down or damaged, and so on; in case such damages arises you must restore or repair the houses, and in case you have to substitute one building for another you shall not *be required to substitute one of greater value than [726 the value of the one at present on the premises." The parties had under their consideration the extent and nature of the injury for which they intended that the grantee of the mine should compensate. And the language, I think, shows an intention on the part of the lessor and the lessee to limit the damages as expressed in that covenant; and I think it would be a very great hardship on a lessee who thought he had guarded against being open to indefinite damages, if he should be liable to be told, "You have not done that; that is only a cumulative provision, you are still liable for any damage you may do, just as much as if you had entered into such covenant." The case that most weighed upon my mind was *Smart v. Morton* ⁽¹⁾; but it appears clear from the expressions used in *Rowbotham v. Wilson* ⁽²⁾, that the parties are not limited to particular stipulations. The man who grants the minerals and reserve the surface is entitled to make any bargain that he likes: both parties are just as much at liberty to make a bargain with reference to coals and minerals, as to make a bargain with reference to anything else. And when I find a bargain, as it appears to me, expressing the intention of the parties, it gets rid of all the difficulties which were very forcibly and ingeniously urged. I agree entirely in

(1) 5 E. & B. 30; 24 L. J. (Q.B.), 260.

(2) 8 H. L. C., 348; 30 L. J. (Q.B.), 40

the judgment which my brother Blackburn has pronounced, and must say that the pleas are good, and that the replications are bad.

LUSH, J. I am of the same opinion. I take it to be well established by the cases that a grant of all the minerals under certain lands, without more, must be read, not as meaning a grant of all the minerals that can be found under those lands, but of all the minerals that may be taken away from under those lands without disturbing the surface. And if to that grant be super-added provisions for compensation for damage done to the surface, if the words giving compensation can be fairly satisfied by reference to acts done on the surface, though they may be large enough to extend to damage done to the surface by taking away the support, still they must be read as confined to acts done on 727] the surface, the *presumption being that the grantor did not intend to enable the grantee of the minerals to take away the support from the surface soil. Now if the words of this lease contained only phrases of that description capable of being satisfied by reference to acts done on the surface, I should agree with Mr. Dowdeswell that they did not confer power on the lessees to take away the minerals without leaving support under the surface soil. But the words are not capable of being so read; you cannot satisfy the terms of the grant without imputing to the grantor an intention to enable the grantee to take away all the minerals he may find there, though the effect of the working may be to let down the surface land. The words of the grant are in general and very extensive terms. [The learned judge read the grant.] Then comes the condition, "They, the said lessees, making reasonable satisfaction to the said lessors and their tenants for the damage done to them respectively, by the surface of their land being covered with rubbish or otherwise injured, or as he or they should or might sustain, as well by the injury done to the lands of the said lessors in sinking and getting the said mines and minerals, and converting coal into charcoal" . . . Had it stopped there I should have agreed with Mr. Dowdeswell that all those terms might have been satisfied by referring to injuries done on the surface, — sinking pits on the surface, or bringing rubbish upon the surface. But they are large enough to be applied to damage done to the surface by mining operations underneath. In what sense they are used is to be ascertained, I think, by the words which follow; "As well by the injury done to the lands of the said lessors in sinking and getting the said mines and minerals, and converting coal into charcoal, as for such damage or injury as might be done or caused in the dwelling houses or other buildings of the said lessors, by getting mines of coal, ironstone, or other stone or

other minerals, under or near to any of the dwelling houses or other buildings of the said lessors according to the covenant hereinafter contained for that purpose." Here, therefore, is contemplated injury to dwelling houses and other buildings on the surface by mining operations. That cannot mean injured by any acts done on the surface; it must mean from mining operations below. That is more clearly shown when you come to the covenants for compensation. [The learned judge read *the covenant.] It clearly appears from that covenant [728 that the parties contemplated that the mining operations authorized by the lease might result in injury to the surface and to the buildings upon it, even to their destruction. That gives a meaning to the words of the grant which I have already read, and shows that the parties had in their contemplation that the surface soil might be greatly disturbed by the mining operations which it was intended should be carried on by virtue of the lease. This is further confirmed by the provisions by which the lessees are bound to a certain extent to make compensation. Therefore, I think, taking the whole of the deed together, it is clearly shown that the intention of the parties was that the lessees should take away all the minerals they found, even though the effect might be to injure the surface, only making such compensation as was therein provided. *Judgment for the defendants.*

Attorney for plaintiff: *A. J. Holmes.*

Attorneys for defendants: *W. Polls, for Polls & Son, Brosley.*

June 15, 1872.

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[Law Reports, 7 Queen's Bench, 748.]

Conveyance of House—"House now in the Occupation of P."—Ornamental Frontage extending across adjoining House.

The plaintiff, having agreed to purchase two adjoining houses, agreed to sell one to P., and by plaintiff's direction that house was conveyed to P. (and by him to defendant) in fee, the description being, "all that dwelling house now in the occupation of P." The houses were in a street, and were built up to the foot pavement. On the front of defendant's house, at the side which adjoined the plaintiff's, was a slight projection nine feet wide, in the middle of this was the doorway, three and a half feet wide, and on each side of the doorway was a pillar supporting a shallow portico; over the doorway was a window of the same width, and above that a pediment; all symmetrically placed on the nine feet projection. Inside the party wall, dividing the two houses, instead of being coincident with the extremity of the nine feet projection, was in a direct line with one side of the doorway, so that if the party wall had been prolonged in a straight line to the street, two feet eleven inches of the width of the projection, which included part of the portico and of the pediment and the whole of one of the pillars supporting the portico, would have been on the plaintiff's side of that line; and on the inside, these two feet eleven inches, which, from the outside, appeared to be part of defendant's house, formed part of the wall of the front room of plaintiff's house. The defendant having painted the two pillars, the portico, and the whole of the pediment, which were stucco, plaintiff brought an action of trespass, claim-

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ing as his the one pillar, the part of the portico, and the part of the pediment over the pillar. On the above facts, the Court having power to draw inferences of fact:

Held (by Blackburn and Mellor, JJ. ; Lush, J., dissenting), that the disputed parts belonged to the plaintiff, and did not pass as part of the house in the occupation of P.

DECLARATION for trespass in painting parts of the walls of plaintiff's house.

Pleas, *inter alia*, 2d, that the said house and the said parts of the said walls were not plaintiff's as alleged; 3d, that the parts of the said walls were the freehold of defendants.

Issue joined.

At the trial, before Blackburn, J., at the last Suffolk Spring Assizes, it appeared that the plaintiff had become the purchaser in fee of two adjoining houses in Museum Street, Ipswich, and he had agreed to sell the southern house to R. M. Phipson; and by deed of the 13th of August, 1853, to which the plaintiff was a party, and which recited the plaintiff's agreement to purchase the two houses and his agreement to sell one to Phipson, the owners in fee, by direction of the plaintiff, conveyed to Phipson 749] in fee "all that *messuage or dwelling house, with the garden thereto belonging, situate in the parish of St. Matthew, in Ipswich, lately in the occupation of Miss Gooch, now in the occupation of the said R. M. Phipson, together with the walls belonging to the said messuage and premises, and the walls bounding or dividing the said garden, except nevertheless that the wall dividing the said messuage from the said messuage in the occupation of Robert Charles Burton, and retained by the said John Fox [the plaintiff] is to be considered a party wall, and to be enjoyed by the said John Fox and the said R. M. Phipson, and their respective heirs and assigns, and their respective tenants accordingly, and also subject as to the wall dividing the said garden hereby conveyed from the premises so retained by Fox to the use of the same by Fox, his heirs and assigns, and his and their tenants, in common with Phipson, his heirs and assigns, and his and their tenants" and (after further describing the back premises) "which said messuages and dwelling house, garden, walls, passages, and hereditaments are by way of further identity laid down and delineated on the map or plan thereof drawn in the margin of these presents. Together with all and singular the houses, outhouses, edifices, buildings, yards, gardens, rights, ways, paths, passages, waters, watercourses, liberties, privileges, covenants, profits, and commodities and emoluments whatsoever to the said messuage or dwelling house hereby granted, belonging or appertaining, or in any way reputed to belong or appertain, or held, occupied, or enjoyed with or as part of, parcel or member of the same."

Phipson, by deed of the 2d of January, 1866, reciting the above conveyance, conveyed the house and premises, &c., to defendant in fee.

The two houses formed part of a row of houses in the street of uniform elevation built quite up to the foot pavement, and on the front of defendant's house at the side which joined the plaintiff's house was a slight projection of two or three inches and nine feet in width. Symmetrically placed in the middle of this projection was the doorway, three feet and a half wide, and on each side of the doorway was a pillar supporting a shallow portico. Over the portico was a bedroom window of the same width as the doorway, and over the window was a pediment which extended a few inches *beside each side of the pro- [750] jection, and under the window was a string course, which also extended the whole width of the projection (*). On the inside, however, the party wall dividing the defendant's house from the plaintiff's house, instead of being coincident with the end of the projection, was about two feet eleven inches more to the south, being in fact in a direct line with the side of the doorway; so that from two to three feet of that, which appeared from the outside to form part of the defendant's house, from the inside formed part of the wall of the front room of the plaintiff's house (*).

The plan attached to the conveyance to Phipson was a very small ground plan not drawn to scale. It showed the bases of the two pillars, both of them being on the defendant's side of the line drawn to represent the party wall. The houses were of brick, but the pillars, pediment, &c., were of stucco.

The action was brought for painting the pillar and the parts of the portico over it and of the string course and of the pediment, all of which were to the north or plaintiff's side of the middle of the party wall, and all of which the plaintiff claimed as part of his house, while the defendant claimed them as part of the house in the occupation of Phipson.

The learned judge directed a verdict for the plaintiff on the second and third issues (the jury being discharged as to the others), with leave to move to enter the verdict on those issues for the defendant, if the Court, having liberty to draw inferences of fact, should be of opinion that on the evidence the defendant was entitled to the verdict.

A rule was obtained accordingly.

O'Malley, Q.C., and *Blofeld*, showed cause. The parts in dis-

(*) This appeared from a photograph which was put in.

(*) This appeared from a plan put in: it also appeared that the party wall ran only fifteen feet from the front in the

above direction, and after this the defendant's house and premises widened out some eight or nine feet behind and beyond the front rooms of the plaintiff's house.

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pute are clearly the property of the plaintiff. They form parts of the outside walls of his house. It is true they form part of the architectural design of the row of houses, and for this purpose appear to belong to the defendant's house. But they are 751] no part *of the house "occupied" by Phipson, for neither he nor the defendant as occupier had any enjoyment of them; and there are no other words capable of passing them. The plan attached to the conveyance is erroneous, and cannot be relied on by either party, as the base of the pillar and the party wall are relatively misplaced.

Manisty, Q.C., Bulwer, Q.C., and Graham, in support of the rule. The parts in question form parts of the defendant's house, and passed under the words in the conveyance of "the house now in the occupation of Phipson." True, there has been no actual—that is, physical—enjoyment of these parts; but that may be said of any of the outside ornaments of a house. They form part of the house, and if they are cut off the house is no longer the same house as that occupied by Phipson. The plan attached to the conveyance is in the defendant's favor; it shows the base of the column (and therefore all perpendicularly above it) to be part of the defendant's house; and as to the base of the column and the party wall being relatively misplaced, that is only because the plan is drawn too favorably for the plaintiff by putting the party wall too far out. If the parts in question do not belong to the defendant, there is nothing to prevent the plaintiff from defacing them in any way he pleases; indeed, he can knock the ornamental part off and leave the defendant with a lop-sided pediment and a portico with only one pillar. At the least, these parts must be treated as a continuation of the party wall, to be enjoyed by both.

BLACKBURN, J. Although we are not agreed, I do not think it a case in which any benefit could possibly be derived from taking time to consider, for the whole matter lies in a very small compass, and it is more a question of fact than of law. It appears that the plaintiff having contracted to purchase the two houses, which are built adjoining one another, the owners of the legal estate, by the plaintiff's direction, conveyed one of them to Mr. Phipson in fee. [The learned judge read the description of the house, including that as to the party wall.] It is pretty clear, therefore, that what was conveyed to Phipson was all the house then in his occupation. We have no evidence as to what was the occupation of the premises before him. That 752] question being left to the Court, who *are to draw conclusions of fact, we have to decide what was conveyed. The conveyance expressly conveys the walls (though that was unnecessary, as a conveyance of a house of course includes the

walls), except the wall dividing the two houses, which is to be enjoyed by the respective owners as a party wall. But as to that there is no question; the question is, whether the external parts of the building which the plaintiff claims really belong to the plaintiff or defendant. The exact question which we have to decide is, what was the house that was occupied by Phipson at the time the conveyance to him was made. On that point we have but two pieces of evidence to look to. The first is the photograph. Any one looking at that would not fail to come to the conclusion that the defendant's house extended so far as to include the whole of the nine feet projection. No one from the outside would doubt that the whole of the part inside the projection belonged to the defendant's house. But, in point of fact, two or three feet inside belong to the plaintiff's rooms, the middle line of the party wall, which divides the plaintiff's house from the defendant's house, being about that distance from the outer edge of the projection on the plaintiff's side. So that when you come to look at the inside you find that from two to three feet of the wall, which any one looking from the outside would certainly say was part of the defendant's house, is in reality the wall which is built for the purpose of keeping out the wind and weather from the plaintiff's rooms inside. Therefore, I should say, *prima facie*, that this would be part of the plaintiff's house, and not part of the defendant's house.

In answer to this, what is urged on the part of the defendant is, that part of the space which goes beyond the party wall is occupied by a pillar which supports a portico, and that that pillar is so much intended to support the top of the portico that it may well be said that the pillar and this part of the portico are part of the defendant's house. If that were so, that would not carry a verdict for the defendant, for the defendant claims a considerable portion beyond this. But it is part of the defendant's house only in this sense, that any one looking at the outside would see that, for the purpose of general architectural effect, the front has been built so as to make it appear as if the defendant's house extended to the extreme edge of the projection. But this mere architectural ornament *is not a thing which the defendant [753] would use more than any other person. It seems to me that the plaintiff would enjoy the architectural beauties of the street as much as the defendant; so would the neighbors. I think that these external ornaments were not conveyed. What was conveyed was what Mr. Phipson used and enjoyed, and I think that meant the house he lived in, all the interior he lived in, and as much of the exterior as was requisite to support and maintain that interior. I think the *prima facie* rule to be taken when you are dividing one house from another, is to find what the in-

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fendant. If the builder had carried a balcony over the portico to the extreme end adjoining the plaintiff's house, it does not seem to be disputed it would have belonged to the defendant. Why? Only because it stood on the soil of the defendant, and would be part of the fabric of the house. So, in my view, the pillar which supports the portico, the cornice and the pediment, which are necessary to complete the architectural fabric of the house, are as much part of the house as the balcony would be; for you cannot cut them off without making the house a different structure from what it was when the owner sold it. I therefore think our judgment ought to be for the defendant, but as the majority of the Court are of a different opinion, the rule must be discharged.

Rule discharged.

Attorneys for plaintiff: *White & Barrett, for Westhorp, Ipswich.*

Attorney for defendant: *Crowdy, for Aldous & Pearce, Ipswich.*

May 31, 1872.

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*WULFF AND BILLING V. JAY.

[Law Reports, 7 Queen's Bench, 756.]

Principal and Surety — Loss of Security — Discharge of Surety — Laches of Creditor.

The plaintiffs lent to B. and P., who were traders, 300*l.*, for the repayment of which the defendant became surety. At the time of the loan B. & P. assigned by deed dated the 25th of August, 1870, to the plaintiffs, as security for the debt, the lease of their business premises and plant, fixtures, and things thereon. The deed provided for the repayment of the loan upon the 25th of August, 1871, and for the payment of interest on the 25th of February, 1871, and stipulated, that until default in payment of either the principal or interest, B. & P. should continue in possession of the property assigned to the plaintiffs: and that upon such default the plaintiffs should not sell without giving B. & P. one month's notice in writing. This deed was not registered under 17 & 18 Vict. c. 36. B. & P. failed to pay interest upon the 25th of February, but the plaintiffs did not enter into possession. About a week before the 5th of August, the plaintiffs received notice that B. & P. were insolvent, but they allowed them to continue in possession, and on that day B. & P. filed a petition for liquidation under the bankruptcy Act, 1869, and were adjudged bankrupts. The trustee under the bankruptcy seized and sold the goods and chattels assigned by the deed:

Held, that the plaintiffs, by their omission both to register the deed and to seize the property assigned to them on default of payment of the interest, had deprived themselves of the power to assign the security, to the surety, and that owing to their laches he was discharged to the amount that the goods were worth.

DECLARATION. That the defendant on the 25th of August, 1870, by deed covenanted with the plaintiffs, that he would on the 25th of August, 1871, pay unto the plaintiffs the sum of 75*l.*, or if required so to do, purchase in the names of the plaintiffs or the survivor of them, in the books of the governor and company of the Bank of England, the sum of 82*l.* 8*s.* 4*d.* three per cent. reduced annuities, and would also on the 25th of August in each succeeding year pay the sum of 75*l.*, or if required so

to do in manner aforesaid, purchase in the names of the plaintiffs, or the survivor of them, the sum of 82*l.* 8*s.* 4*d.* three per cent. reduced annuities; and would also yearly and every year, until the sum of 300*l.* should be fully paid and satisfied, pay unto the plaintiffs' interest on the sum of 300*l.*, or on so much thereof as should from time to time remain unpaid, or unpurchased, at and after the rate of 5*l.* per cent. per annum, to be computed from the date of the deed, and that in case default should be made in the payment of the sum of 300*l.*, or in the *invest- [757
ment of the sum of 329*l.* 13*s.* 5*d.* three per cent. reduced annuities, at the times and in manner mentioned, the defendant would forthwith, after such default should have been made, upon the request of the plaintiffs, repay the plaintiffs the sum of 300*l.*, or so much thereof as should be unpaid, or invest the said sum or the residue thereof then unpaid, in the purchase of 329*l.* 13*s.* 5*d.* three per cent. reduced annuities, or so much thereof as should not have been repaid or invested. And the defendant did not pay the sum of 75*l.* on the 25th of August, 1871, nor has he paid the interest on the sum of 300*l.* for the year ending the 25th of August, 1871; and although defendant made default in payment of the sum of 75*l.*, the first instalment of the sum of 300*l.*, and the plaintiffs requested the defendant to repay the 300*l.*, yet the defendant has not paid the same, and the 300*l.* and interest from the date of the deed still remains wholly due in arrear and unpaid.

Plea, upon equitable grounds, that the deed set out in the declaration was made between one Burns of the first part, defendant of the second part, and the plaintiffs of the third part, and by the deed the plant and stock in trade of Burns and his partner Pim were assigned to the plaintiffs as security for the sum of 300*l.* advanced by the plaintiffs to Burns and his partner Pim. And that after the execution of the deed, to wit, on the 6th of August, 1871, a petition for liquidation was filed in the London Bankruptcy Court by Burns and Pim; that a trustee to the joint estate of the two petitioners was duly appointed, and that the plant and stock in trade of the petitioners being the same assigned to the plaintiffs by the deed recited in the declaration, were sold by public auction, of all which premises the plaintiffs had due notice and were well aware; but of all which premises the defendant knew nothing, and received no notice; and that such plant and stock in trade were more than sufficient to cover the sum advanced by the plaintiffs to Burns, and to satisfy the debt, for the payment of which the defendant became surety for Burns, and entered into the covenants set forth in the deed. And that the plaintiffs did not, as it was their duty to do, take possession of the plant and stock in trade, but allowed the same

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to be taken possession of by the trustee appointed to the joint 758] estate of Burns and Pim, and permitted the *same to be sold and applied to the liquidation of the debts of Burns and Pim, other than to secure the payment of which the said plant and stock in trade were assigned the plaintiffs. And that by their conduct in this respect the plaintiffs have exonerated the defendant from the covenants entered into by him in the deed recited in the declaration.

Issue joined.

At the trial, before Quain J., at the Middlesex sittings after Hilary Term, 1872, the following facts were proved. In the month of August, 1870, Messrs. Burns and Pim, who carried on the business of printers in partnership, applied to the plaintiff Billing, who was an attorney, for a loan of money. Billing agreed to lend them the sum of 300*l.*, part of certain trust moneys in the funds, in the name of himself and the plaintiff Wulff; and he stipulated that Burns and Pim should give by way of security a mortgage of the lease of the partnership premises, and of the plant, fixtures, and goods therein, and also that two sureties should join in a guaranty for securing the payment of the mortgage money.

The mortgage deed was dated on the 25th of August, 1870, and was made between Burns and Pim, thereafter called the mortgagors, of the first part, the defendant, thereafter called the surety, of the second part, and the plaintiffs, thereafter called the mortgagees, of the third part, and after reciting that the plaintiffs had sold the sum of 329*l.* 13*s.* 5*d.* three per cent. reduced annuities, standing in their joint names, which had produced the sum of 300*l.*, and that the repayment of that sum, or the repurchase of the sum of 329*l.* 13*s.* 5*d.*, should be secured, the deed assigned to the plaintiffs the partnership premises, consisting of a workshop, for the residue of a term of twenty-one years, and also assigned the plant, trade fixtures, goods, chattels, and things upon the premises, subject to a proviso for redemption if the mortgagors should pay to the mortgagees on the 25th of August, 1871, the sum of 75*l.*, part of the 300*l.*, or if required so to do by the mortgagees, purchase in the name of the mortgagors the sum of 82*l.* 8*s.* 4*d.* three per cent. reduced annuities, and also on the 25th of August in each succeeding year, pay 75*l.* or purchase the sum of 82*l.* 8*s.* 4*d.* three per cent. reduced annuities; and also if the mortgagees should pay interest on the 759] sum of 300*l.* on or *so much thereof as should for the time being remain unpaid or unreurchased, after the rate of 5*l.* per cent. per annum by equal half-yearly payments on the 25th of February and the 25th of August in every year; and until default should be made by the mortgagors in the payment or

investment as mentioned, the mortgagors should remain in possession and receipt of the rents, profits, &c., of the workshop, plant, fixtures, and things. The deed contained a power of sale on default being made in the repayment or investment of the principal sum, or in the non-payment of the interest, provided that one calendar month's notice in writing be given to the mortgagees requiring payment before exercising the power of sale. The deed contained covenants by the mortgagors and the surety, to pay the principal and interest according to the agreement of the parties.

The first half-year's interest became due on the 25th of February, 1871, and was not paid. Shortly afterwards the mortgagors became embarrassed, and on the 5th of August, 1871, filed a petition for liquidation, in the London Court of Bankruptcy, and were adjudged bankrupts on the 20th of August; one Venn, a partner of the plaintiff Billing, acting for the mortgagees in the bankruptcy proceedings. Their insolvency, prior to the bankruptcy, was, a week before the petition was filed, well known to the plaintiff Billing, to whom they were otherwise indebted. The deed of assignment was not registered under 17 & 18 Vict. c. 36, and the trustee appointed by the Court of Bankruptcy took possession of the plant, fixtures, and things, which were afterwards sold for the benefit of creditors, and realized 300*l*.

On these facts a verdict was by consent entered for the plaintiffs for 340*l*., leave being reserved to enter the verdict for the defendant, the Court having power to draw inferences of fact.

A rule was afterwards obtained to enter a verdict for the defendant, or to reduce the damages to such sum as the Court should direct, upon the grounds that on the facts proved the defendant had an equitable defence to the action, and as surety was discharged as to the whole or part of the claim: that the equitable plea was proved, and that the plaintiffs were guilty of such laches and conduct as would in equity discharge him as surety.

H. T. Cole, Q.C., and *Gibbons*, showed cause. It will be contended for the defendant that he is discharged; first, [760 because the plaintiffs have not registered the assignment; secondly, because they have been guilty of laches in omitting to enter upon the mortgaged premises and to seize the goods comprised in the deed. These grounds are untenable. The omission to register is in itself of small moment, because, without entry, the goods and chattels would have passed to the trustee in bankruptcy as being under the bankrupts' order and disposition. This is clear from *Bulger v. Shaw* (¹). As there is no

(¹) 2 E. & E., 472; 29 L. S. (Q.B.), 73.

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express power in the deed to enter and seize, the plaintiffs could only sell after giving a month's notice, and mere laches on the part of the creditors in not seizing does not discharge the surety. A mere omission by the creditors to do an act beneficial to the surety does not discharge him: *Black v. Ottoman Bank* ⁽¹⁾.

Watts v. Shuttleworth ⁽²⁾ is distinguishable on the ground that the creditor failed to perform what he had undertaken to do. In Story's Equity Jurisprudence, s. 326, it is laid down that there is no positive duty incumbent on the creditor to prosecute measures of active diligence, and therefore mere delay on his part will not amount to laches so as to discharge the surety. The plaintiffs have done no act against the faith of the contract with the surety, therefore, he is not set free from liability: *Petty v. Cooke* ⁽³⁾. At all events the surety is not altogether discharged; he is discharged only pro tanto: *Capel v. Butler* ⁽⁴⁾; *Strange v. Fooks* ⁽⁵⁾. Here the verdict can only be reduced by the amount for which the goods sold.

Prentice, Q.C., and *Baker Greene*, in support of the rule. Upon the first day for payment of interest, viz., the 25th of February, 1871, the debtors made default: the plaintiffs might then have entered and seized, although they could not have sold without a month's notice. By entry and seizure they would have defeated the operation of both 17 & 18 Vict. c. 36, and the Bankruptcy Act, 1869, s. 15, subs. 5. The plaintiffs were again guilty of laches in not entering and seizing a week before the filing of the debtors' petition for liquidation, at which time the plaintiff Billing had notice that the debtors were in insolvent circumstances. The *words at the end of s. 326 in Story's equity jurisprudence are in defendant's favor; the author says that if the creditor by his negligence loses a security, the loss will operate at least to the value of the security to discharge the surety. The surety is protected against the laches of the creditor, not only in equity but also at law, by virtue of the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 5; by that enactment the surety, on payment of the debt, is entitled to an assignment of all securities, possessed by the creditor, but in this case the security is destroyed, and therefore cannot be assigned to the defendant: *Watts v. Shuttleworth* ⁽²⁾ is precisely in point.

[QUAIN, J. An omission to register a memorial of an annuity bond discharges the surety: *Stratton v. Rastall*. ⁽⁶⁾]

COCKEURN, C.J. This is an action brought against the defendant, as surety. It appears that as part of the transaction between the principal creditors and the debtors, there was to be

⁽¹⁾ 15 Moore P. C., 472.

⁽²⁾ 5 H. & N., 235; 29 L.J. (Ex.), 229.

⁽³⁾ Law Rep., 6 Q. B., 790.

⁽⁴⁾ 2 S. & S., 457.

⁽⁵⁾ 4 Giff., 408.

⁽⁶⁾ 2 T. R., 368.

a mortgage of the plant, trade fixtures, and things upon the debtors' premises, by bill of sale as security for the principal debt.

The debtors were to remain in possession of the things thus mortgaged until default, and the creditors were to have power, in the event of a default in the payment of the instalments of the debt which were to be paid under the bill of sale, or in the event of the interest, which was to accrue from time to time, not being paid, to enter and sell the things thus assigned upon giving a month's notice.

Now it appears that in the month of February interest first became due, and that interest was not paid, and it remained unpaid until the month of August, when the debtors became bankrupt. It further appears that the insolvent condition of the debtors' affairs was plain, and that bankruptcy was imminent, and had been impending for some time before it actually took place; and it further appears that one of the creditors was cognizant of that fact, and was afterwards, when the bankruptcy took place, solicitors to the proceedings in bankruptcy. He was therefore perfectly aware of the bankruptcy being imminent. Notwithstanding he took no steps either to protect the bill of sale by registration, or to enter and take possession of the effects.

*Now, I think there was a twofold laches on the plaintiffs' part—laches in the first part in not registering the bill of sale. If they had registered it the effect would have been that the fixtures would have been protected. That would not have applied to the other moveables which remaining in the order and disposition of the bankrupt would have been affected by the bankruptcy. But then there was laches if possible of a more serious description affecting not only the moveables but the fixtures also. The plaintiffs might have entered and taken possession upon the interest not being paid at the time when it became due. Instead of doing this, however, they allow the mortgagors to remain in possession when they see that bankruptcy is impending and imminent. I cannot doubt myself that their intention was, that, being creditors ultra the amount thus secured, the goods in question should be available as assets under the bankruptcy, while they had the security of the defendant to come upon in order to get paid the debt of 300*l.* secured by the sale. I think, looking at all the circumstances, it is impossible to say that the plaintiffs did what they ought to have done to realize the security they possessed. Cases have been cited and authorities have been referred to in Story's Equity Jurisprudence, which abundantly establish that which is a common and well known proposition, that where a debt is secured by a surety, it is the business of the creditor, where he has se-

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curety available for the payment and satisfaction of the debt, to do whatever is necessary to make that security properly available. He is bound, if the surety voluntarily proposes to pay the debt, to make over to the surety what securities he holds in respect of that debt, so that, being satisfied himself, he shall enable the surety to realize the securities and recoup himself the amount of the debt which he has had to pay. This is now a well known proposition. Here, by registering the bill of sale, and by afterwards availing themselves of the power which they possessed to take possession, the plaintiffs might have secured the payment of the debt to themselves, or by protecting the securities and holding them in their hands they could have made them over to the surety when the surety was willing, or was called on, to pay; but by omitting to do what was necessary in [763] order to place themselves in that position, and by *allowing bankruptcy to supervene so as to enable the trustee under the bankruptcy to take possession of these goods adversely, it is clear that they have placed the surety in a position very detrimental and prejudicial to the surety; and for that the surety ought to have, according to the general doctrine, a remedy. I think the creditors have clearly been guilty of laches in not protecting themselves, and in not availing themselves of these securities. Then it is said, granted that at the end of the time when the interest had accrued the surety was liable both for principal and interest, and the principal and interest together amounted to 307*l.* 10*s.*, although the surety is entitled to say to the creditors, "I am entitled either to have such security as you have made available for this debt, or I am entitled to set off the amount against what I owe you under my agreement to indemnify you against loss in respect of this debt," yet he can only say it to the extent of the value of the security itself. Now, it appears that these goods which the creditors might have taken possession of and made available for the payment of the debt, or to which they might have given the surety a title in order that the surety might recoup himself the amount of his debt, were of the value of 300*l.* They sold for 300*l.* That is exactly the amount of the original principal debt, and there is nothing to satisfy us that they did not realize their value; I do not find anything leading to any other conclusion than that the goods did in fact sell for what they were really worth. We must take it, therefore, that all that was realized was 300*l.* Now, interest having accrued, the debt was 307*l.* 10*s.*, and in respect of the odd money, the plaintiffs must have their verdict. There will, therefore, be a verdict for the plaintiffs for 7*l.* 10*s.*

HANNEN, J. I am of the same opinion. I think that the plea is substantially proved. We are not bound by the exact terms

of it; but I take it to be established that the defendant became surety upon the faith of there being some real and substantial security pledged, as well as his own credit, to the plaintiffs; and he was entitled, therefore, to the benefit of that real and substantial security in the event of his being called on to fulfil his duty as a surety, and to pay the debt for which he had so become surety. He will, however, be discharged from his liability as surety if the *creditors have put it out of their power [764 to hand over to the surety the means of recouping himself by the security given by the principal. That doctrine is very clearly expressed in the notes in *Rees v. Barrington* (1). "As a surety, on payment of the debt, is entitled to all the securities of the creditor, whether he is aware of their existence or not, even though they were given after the contract of suretyship, if the creditor who has had, or ought to have had, them in his full possession or power, loses them or permits them to get into the possession of the debtor, or does not make them effectual by giving proper notice, the surety to the extent of such security will be discharged. A surety, moreover, will be released if the creditor, by reason of what he has done, cannot, on payment by the surety, give him the securities in exactly the same condition as they formerly stood in his hands." And numerous cases are cited in support of those statements.

Now, let us see whether there has been such failure on the part of the principal creditors in this case. It was argued by Mr. Cole that there was no power to do anything by way of realizing the securities until after the month's notice. But that is not so. There is no power to realize by selling without notice, but the mortgagees are only entitled to retain possession of the property until they make default, and on their making default the mortgagees have the ordinary right of mortgagees to seize that which is already their property, although they are restrained by the terms of the deed from selling immediately. Default was made, according to the terms of the deed, in February, when the first instalment of interest became due. Upon default taking place, the mortgagees, if they had chosen to act upon the power given them by the deed, might have taken possession of this property, the effect of which taking possession would have been to defeat both the bills of sale act and the order and disposition clause in the bankruptcy act, and they would have been in a position, therefore, to hold this property as against the trustee in bankruptcy. I am not prepared to say that they were guilty of such laches the instant the interest became due as would have entitled the surety to maintain that he was released, but I think that is a question

(1) 2 White & Tudor's L. C., 4th ed., at p. 1002.

which might have gone to the jury; and if I were in the place 765] *of the jury I should certainly find that there had been laches and negligence on the part of the plaintiffs. The interest is due in February, when they might have seized, and they take no step whatever until the bankruptcy intervenes in August, although shortly before the bankruptcy took place they became aware that the circumstances of the debtors were such as would make it right, in the interest of all parties concerned, that the security should be protected. And the case is all the more strong because one of the plaintiffs is an attorney, and therefore he would be likely to know the law; but it is clear that he having delayed so long to take possession, there were circumstances from which the jury would be warranted in finding that there was negligence on the part of the plaintiffs in that respect, and in consequence of that negligence, the value of this security has been lost.

Then with regard to the amount: when the first payment of interest became due, the surety at one and the same moment becomes liable to pay 300*l.*, and 7*l.* 10*s.* That was the amount for which he was liable. I think he was not liable for anything more than that, because being discharged from the principal sum by the laches of the creditors, he is also discharged from that which is incident to the principal, namely, the interest; but that does not apply to the interest which became due at the same moment as the principal became due, and which therefore was a debt or a liability which then accrued to the surety. Then, if the security had been handed over to him, as the event shows, he would not have been able to realize by way of recouping himself more than 300*l.*, and it follows he would remain liable for 7*l.* 10*s.*, and I think therefore that the verdict ought to be reduced to that amount.

QUAIN, J. I am of the same opinion. The rule, as it is laid down by Stuart, V.C., in *Strange v. Fooks* ⁽¹⁾, is in these words:—"It is perfectly established in this court, that if through any neglect on the part of the creditor, a security to the benefit of which a surety is entitled is lost, or is not properly perfected, the surety is discharged." It seems to me that this case comes directly within that rule. The deed expressly provides that, 766] "In *the mean time, and until default be made by the mortgagors in the payment or investment, as hereinafter mentioned, the mortgagors shall remain in the possession and receipts of the rents and profits of the premises, plant, fixtures, and things," and it gives the mortgagees the right to seize on default being made, and every other remedy, except selling, for

(1) 4 Giff. at p. 412.

which it is requisite that there should be a month's notice. Now that being the case, the debtors make default on the 25th of February, 1871, and the mortgagees take no steps to protect the goods from the operation of the bills of sale act, if it is within that act, or from the reputed ownership clause in the bankruptcy act. They do not take possession of the fixtures or plant, or any of these goods, but allow the property in them to pass to the trustee. The mortgagees well knew the state of their debtors, one of the mortgagees being the attorney who conducted the bankruptcy proceedings. The result is, that the mortgagees stand by and allow the whole of this property to be swept away by the trustee in bankruptcy, and sold for the benefit of the estate. It appears to me, therefore, that that property which has been allowed to be sold by the mortgagees, is the very property which the surety was entitled to have handed over to him if he paid the sum that was due, viz., 307*l.* 10*s.* It seems to me to fall precisely within the rule that has been referred to, and that pro tanto the surety is discharged, and the verdict ought to stand only for 7*l.* 10*s.*

Rule absolute to reduce the damages accordingly.

Attorneys for plaintiffs: *Billing & Venn.*

Attorneys for defendants: *Merriman, Powell & Co.*

If the creditor hold a policy of insurance on the life of the debtor, a surety is released, to the extent of the policy, if the creditor allow it to become forfeited for non payment of premiums. *Soule v. Union Bank*, 30 How. Prac., 105, 45 Barb., 111.

So if a note be delivered to a creditor, as collateral security, he is bound to the same diligence as a bailee for hire in attempting a collection. If the amount of the note be lost, through failure to collect, the creditor is liable therefor. *Wakeman v. Gowdy* 10 Bosw., 208:

Smith v. Wilson, Andrews (Eng.) Rep., 190, 228, 1 Sto. Eq. Jur., § 336.

So if a creditor by any act incapacitate himself from subrogating the surety to his rights. *Chester v. Bank*, 16 N. Y., 336; 1 Sto. Eq. Jur., §§ 325, a, 326.

Mere delay, however, by a creditor in not taking legal measures upon the obligation of the principal debtor, on which the surety is liable, will not discharge the latter. *Looney v. Hughes*, 26 N. Y., Rep., 514, 522, Smith's Man. of Eq., 85; 1st Am. ed., 1 Sto. Eq. Jur., § 326.

DETERMINED BY THE

COURT OF COMMON PLEAS,

AND BY THE —

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF COMMON PLEAS,

IN AND AFTER

TRINITY TERM, XXXV VICTORIA.

July 5, 1872.

BAYLEY v. THE MANCHESTER, SHEFFIELD, AND LINCOLNSHIRE
RAILWAY COMPANY.

[Law Reports, 7 Common Pleas, 415.]

*Master and Servant — Railway Company — Responsibility of for Act of Servant —
Scope of Employment.*

A person who puts another in his place to do a class of acts in his absence necessarily leaves him to determine, according to the circumstances which arise, when an act of that class is to be done, and trusts him for the manner in which it is done; consequently he is answerable for the wrong of the person so intrusted, either in the manner of doing such an act, or in doing such an act under circumstances in which it ought not to have been done, provided that what is done is not done from any caprice of the servant, but in the course of the employment.

The plaintiff, a passenger on the defendants' line of railway, sustained injuries in consequence of being violently pulled out of a railway carriage by one of the defendants' porters, who acted under an erroneous impression that the plaintiff was in the wrong carriage. The defendants' bye-laws did not expressly authorize the company's servants to remove any person being in a wrong carriage, but they provided that no person should be allowed to enter any carriage or to travel therein without having first paid his fare and taken a ticket. They likewise provided that the porters should act under the orders of the station master, &c., and do all in their power to promote the comfort of the passengers and the interests of the company:

Held, that the act of the porter in pulling the plaintiff out of the carriage was an act done within the course of his employment as the defendants' servant, and one for which they were therefore responsible.

DECLARATION: 1st count for an assault; 2d count for improper and negligent conduct towards the plaintiff when a passenger on the defendants' railway, on the part of the defendants' servants, by pulling the plaintiff out of a carriage, whereby he sustained various injuries.

Plea: Not guilty. Issue thereon.

At the trial before Channell, B., at the Chester assizes, the facts appeared to be as follows: The plaintiff had taken a ticket from Guide Bridge, the station at which the occurrence which gave rise to the action took place, for Macclesfield, and had taken his seat in a train for the purpose of proceeding to his destination. Just before the train started he inquired of a porter whe-

ther he was in the proper train for Macclesfield. The porter supposed he was not, and said that he was in the wrong train and must come out, and just as the train was getting in motion he violently pulled *him out, and both falling on the [416 platform the plaintiff received the injuries complained of. The plaintiff was in fact in the right carriage.

The bye-laws of the company provided that the porters should act under the orders of the clerks in charge, station masters, station inspectors, and foreman; that they should do the work, and attend to whatever business they might have assigned to them, exerting themselves for the good order, regularity, and cleanliness of the trains and stations where they might be placed, and do all in their power to promote the comfort of the passengers and the interests of the company.

The bye-laws also provided that no passenger should be allowed to enter any carriage on the railway, or to travel therein upon the railway, without having first paid his fare and obtained a ticket, and also if a guard had any reason to believe that a passenger was not in the proper carriage he might request him to show his ticket, for the purpose of having any irregularity corrected, and excess fare paid, if any due. They also provided that a person insisting on smoking in a non-smoking carriage, or intoxicated, might be removed from the carriage; but they did not expressly provide that a passenger might be removed when in a wrong carriage.

On these facts the verdict was entered for the plaintiff for 200*l.*, the damages found by the jury, leave being reserved to the defendants to move to enter a nonsuit, on the ground that they were not responsible, under the circumstances, for the wilful and unauthorized act of the porter, as not being within the scope of his employment, and that there was no evidence of liability.

A rule nisi was accordingly obtained, against which

June 19. *McIntyre*, Q.C., showed cause. The act of the porter in dragging the plaintiff out of the carriage was an act done by him within the scope of his employment, and one therefore for which the defendants are responsible. It is true that the plaintiff was not in the wrong carriage, but the porter thought he was, and intended to remove him in pursuance of his supposed authority to prevent passengers from being in the wrong carriages.

[WILLES, J. This is not like the case of *Lyons v. Martin* (¹), *where the act was a wilfully illegal act, wholly without [417 the scope of the employment. It cannot be that, two men being in the same carriage, such carriage being right for one and

(¹) 8 A. & E., 513.

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wrong for the other, and both being violently pulled out and injured like the present plaintiff, the one in the wrong carriage may maintain his action, and the one in the right carriage cannot.]

Limpus v. London General Omnibus Co. ⁽¹⁾ is directly in point. There the act done was in contravention of the express instructions of the defendants. See also *Seymour v. Greenwood* ⁽²⁾.

Horatio Lloyd (Hughes) supported the rule. It cannot be within the scope of a porter's duty to remove a person from the right carriage. The bye-laws of the company give no instructions to the company's servants to remove passengers, except in two cases, viz., where a passenger insists on smoking or is intoxicated. If a person is supposed to be in a wrong carriage, he can only be requested to show his ticket, so that any irregularity may be corrected, and excess fare paid.

[WILLES, J. Surely there must be authority to remove in various other cases than those of smoking and intoxication. Suppose, for instance, a passenger begins cutting the linings or otherwise damaging the carriage. If a man were in a carriage without a ticket, and refused to come out, would there not be authority to treat him as a trespasser and pull him out, using no more force than necessary?]

No such power is expressly given to the company's servants and it is submitted that it cannot be implied. The case of *Limpus v. London General Omnibus Co.* ⁽¹⁾ is distinguishable. In that case Wightman, J., dissented, and Crompton, J., seems to have doubted considerably. Under these circumstances the doctrine of the case is hardly one to be extended. The acts there done were done for the benefit of the defendants in the course of a competition between the defendants and others, and constituted a mode of doing what the defendants' servant was employed to do. Obviously a master cannot, by general instructions as to the mode of doing the act authorized, such as to drive carefully and so forth, exonerate himself from the consequences of his servant's negligence or improper conduct in doing such act. Here the porter was doing that which he had no authority whatever to do. In *Seymour v. Greenwood* ⁽²⁾ the servant was acting within the scope of his authority in doing the act complained of, though he did it violently and recklessly.

They also cited *Allen v. South Western Ry. Co.* ⁽³⁾, *Walker v. South Eastern Ry. Co.* ⁽⁴⁾, *Roe v. Birkenhead, &c., Ry. Co.* ⁽⁵⁾, *Poulton v. South Western Ry. Co.* ⁽⁶⁾, *Goff v. North Western Ry.*

⁽¹⁾ 1 H. & C., 526; 32 L. J. (Ex.), 34.

⁽⁴⁾ Law Rep., 5 C. P., 640.

⁽²⁾ 6 H. & N., 359; 7 H. & N., 355;
30 L. J. (Ex.), 189, 327.

⁽⁵⁾ 7 Ex., 36.

⁽⁶⁾ Law Rep., 2 Q. B., 534.

⁽³⁾ Law Rep., 6 Q. B., 65.

Co. (*), *Edwards v. North Western Ry. Co.* (*), *McKenzie v. McLeod* (*). *Cur. adv. vult.*

July 5. The judgment of the Court (Willes, Keating, and Byles, JJ.) was delivered by

WILLES, J. This was a rule to enter a nonsuit. The action was for an assault committed upon the plaintiff by a porter in the employment of the defendants, who wrongfully removed the plaintiff from a railway carriage. No objection was raised as to the form of action. The jury found for the plaintiff; and the question is whether there was evidence upon which the jury might lawfully find such an authority to the porter as would make the defendants liable.

The plaintiff, having his ticket, and being in a carriage on the line, inquired of the porter whether he was in the proper train for his destination. The porter fancied that he was not, and so informed him; and, the train having either started or being about to start, the porter pulled the plaintiff out of the carriage, and in so doing seriously hurt him. In fact the porter was wrong, and the plaintiff was in the right carriage. The porter, in order to exculpate the company, contradicted the plaintiff's statement, and also said that he had no authority to do what was alleged. The jury, however, disbelieved him, and believed the plaintiff; and the leave reserved is founded upon his evidence.

*Evidence was given of the rules of the company as to [419 the employment of their servants. The general rule relating to porters was the following: "92. Porters are to act under the orders of the clerks in charge, station masters, station inspectors, and foremen. They are to do the work and attend to whatever business they may have assigned to them, exerting themselves for the good order, regularity, and cleanliness of the trains and stations where they are placed, and do all in their power to *promote the comfort of passengers and the interests of the company.*"

By the bye-law 1, "No passengers will be *allowed* to enter any carriage on the railway, or to travel therein upon the railway, without having first paid his fare and obtained a ticket," &c.: and then follow regulations for the production of the ticket.

It was argued that there was nothing in the rule or bye-laws to give a power of removal; but, who is to prevent the passenger in a wrong carriage from being "allowed to travel therein upon the railway"? Can no officer remove him? The same question might arise as to the person trespassing upon the railway: and, upon the question being put during the argument to counsel for the company, who is to remove such a trespasser,

(*) 3 E. & E., 672; 30 L. J. (Q.B.), 148. (*) Law Rep., 5 C. P., 445.

(*) 10 Bing., 383.

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the answer was, "Send for a policeman." That policeman, however, would have no more power than the porter; indeed, not so much; for, against wilful trespassers, the porter would have a power of removal under the act for regulating railways⁽¹⁾. If the rules do not impliedly give such a power, which it seems they do, it is at least a question for the jury whether a porter, who is to turn his hand to anything, exercising upon a railway, in the supposed "interests of the company," the power of removing a passenger from the train, did so under a general authority to remove trespassers.

If the jury find in the affirmative, then the company are liable for an abuse of the authority. It is not sufficient, in order to excuse a master, to show that the particular act was wrongful, or even that the servant was warned not to do what was wrong. In any case of collision in which the master takes no part, he has his remedy against the servant for misconduct and breach of authority as between them, although a third person injured by the wrongful manner of an act done by the servant in the [420] course of his employment, *has his remedy against both the servant and the master. A person who puts another in his place to do a class of acts in his absence, necessarily leaves him to determine, according to the circumstances that arise, when an act of that class is to be done, and trusts him for the manner in which it is done; and consequently he is held answerable for the wrong of the person so intrusted either in the manner of doing such an act, or in doing such an act under circumstances in which it ought not to have been done; provided that what was done was done, not from any caprice of the servant, but in the course of the employment. The authorities are collected in the case of *The Thetis* ⁽²⁾.

The case of *Lyons v. Martin* ⁽³⁾ was relied upon for the defendants as furnishing an appropriate illustration. There, the master was held not answerable for the act of a servant employed to impound sheep found upon his master's land, but who thought proper to impound sheep found upon the highway out of the land. If he had improperly impounded sheep found upon his master's land, the decision would have been different.

This comparison of passengers to trespassers or supposed trespassers in the form of sheep or otherwise, does not, however, justly represent their condition. They are for valuable consideration entitled to use the company's line, and to be waited upon by the company's servants on their way. And it did sound startling to hear it argued that because of this right, and because of its being wrong to interfere with or injure them, an act done by a servant of the company, though of a class autho-

⁽¹⁾ 3 & 4 Vict. c. 97, s. 10.

⁽²⁾ Law Rep., 2 A. & E., 265.

⁽³⁾ 8 Ad. & E., 512

rized as against a trespasser, gives no remedy to a person in the right. If a porter roughly and negligently showing or helping a passenger into a carriage were to mislead or injure him, he would be acting in the course of his employment within the scope of rule 92, and the company would be liable; and why not for the passenger's being by the same servant acting in the supposed interest of the company roughly and negligently put out of a carriage where he was entitled to be? The distinction would be a refinement for which the law as yet furnishes no precedent.

There was evidence of an authority to remove a person in a wrong carriage abused by a blundering servant of the company in pulling the plaintiff out of the right one, in the supposed "interests *of the company;" and the rule to enter a [421
Rule discharged.

Attorneys for plaintiff: *Lewis & Sons for Higginbotham & Barclay.*

Attorneys for defendants: *Cauliffe & Beaumont.*

A conductor sued for assault and battery, if he intend to justify putting plaintiff off the cars for non-compliance with a rule of the company, must plead such rule, so that the court can see it was reasonable, and that the acts which constitute the alleged assault and battery were done under and pursuant to such regulations. *Pier v. Finch*, 29 Barb, 170.

The conductor is an agent of the company in demanding fare and putting off a passenger for an alleged non-payment, and the company is liable for his acts. *Porter v. New York Central Rail Road*, 34 Barb, 353; *Meyer v. Second Avenue Rail Road*, 8 Bosw., 305; *Passenger, etc.*, v. *Young*, 21 Ohio, St. R., 518.

But if the conductor without cause or pretended cause, throw a passenger off who is waiting to get off when the cars stop, the company is not liable. *Isaacs v. Third Avenue Rail Road*, 47 N. Y., 122, 126.

The test is whether the act was done in the line of duty, and within the scope of the authority conferred by the master. *Isaacs v. Third Avenue Rail Road*, 47 N. Y., 126; *Bryant v. Rich*, 108 Mass., 180.

Though a passenger may be ejected for non-payment of fare, it must not be done while the cars are in motion. *Sanford v. Eighth Avenue Rail Road*, 23 N. Y., 343.

And not with excessive force. *Higgins*

v. *Waterliet Turnpike Co.*, 46 N. Y., 23. The company is responsible for circumstances of aggravation which attend the wrong, and for exemplary damages. *Sanford v. Eighth Avenue Rail Road*, 23 N. Y., 343; *Goddard v. Grand Trunk etc.*, 57 Maine, 202.

The case of *Isaacs v. Third Avenue Rail Road*, 47 N. Y., 122, will probably be adhered to in that state but it seems to the editor, with all deference to the highest court of his own state, without any design to question the soundness of the law there laid down, that the rule laid down by the Court of Appeals in Kentucky (*Sherley v. Billings*, 8 Bush Ky., 147), is the safer one. That court held that common carriers of passengers are held to the strictest responsibility for care, vigilance and skill on the part of themselves and those employed by them and that the carrier must not only protect his passengers against the violence and insults of strangers, and co-passengers, but *a fortiori* against the violence and insults of his own servants. Accordingly the company was held liable for an assault upon a passenger by the clerk of its boat. To the same effect is *Goddard v. Grand Trunk, etc.*, 57 Maine, 202, 10 Am. Law Reg., N. S., 17; and the still more recent case of *Bryant v. Rich*, 108 Mass., 180, reviewing the authorities.

In the latter case it was held that the proprietors of a steam boat for carrying

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passengers, are liable for an assault and battery committed by their steward and table waiters on a passenger who interfered, by a proper remark, upon their rude treatment of a relative and fellow passenger, the court laying down what we believe to be the true rule as follows: "As a general rule the master is liable for what his servant does in the course of his employment; but in regard to matters *wholly disconnected from the service to be rendered, the master is under no responsibility for what the servant does or neglects to do.* The reason is that in regard to such matters he is not a servant. If, therefore, any of the officers or men connected with the running of the defendant's boat had met the plaintiff in the street or elsewhere *in a position wholly disconnected from their duties to the defendants and had*

committed an assault and battery upon him it is clear that the defendants would not have been liable; see *Eaton v. European etc.*, 59 Maine, 520.

It was held in *Drew v. Sixth Avenue Rail Road*, 26 N. Y., 49, that it was part of the duty of a driver or brakeman to assist a passenger in getting upon a car; and so of a conductor to assist him in getting off; *Dow v. Sixth Avenue Rail Road*, 2 Trans. App., 246, S. C.; sub nom. *Drew v. Sixth Avenue Rail Road*, 3 Keyes, 429. The grounds taken in the Kentucky case do not appear by the report to have been taken by counsel in *Isaacs v. Third Avenue Rail Road*, nor is it discussed by the Court, and it is not impossible that the court of Appeals of New York, would follow it, if taken in another case.

June 7, 1872.

STANTON V. RICHARDSON. RICHARDSON V. STANTON.

[Law Reports, 7 Common Pleas, 421.]

Ship and Shipping—Charterparty—Warranty of Seaworthiness—Condition Precedent—Ship unfit for Cargo—Obligation of Shipowner.

A charterparty provided that the ship should load a full and complete cargo of sugar in bags, hemp and compressed bales, and [or] measurement goods. It likewise specified different rates of freight for dry and wet sugar. The ship proceeded to her port of loading, where a cargo of wet sugar was provided for her by the charterer. A great deal of moisture drains from the wet sugar, and when the cargo had been nearly all shipped it was found that there was such an accumulation of molasses in the hold—the result of drainage from the sugar—that the ship would not be seaworthy for the voyage if she proceeded in her then condition. Owing to the nature of the material and the depth of the hold, the ship's pumps were unable to clear the ship of the drainage from the sugar. The ship was perfectly seaworthy except with respect to this particular cargo, and the pumps were quite sufficient for all ordinary purposes. The sugar had to be unloaded again, and the charterer then refused to reload it or to provide any other cargo. Cross actions were brought—the one by the shipowner against the charterer for refusing to provide a cargo, and the other by the charterer against the shipowner to recover damages by reason of the ship not being fit to carry the cargo provided for her.

At the trial the jury, in answer to questions left to them by the judge, found that the cargo of sugar which was offered was a reasonable cargo to be offered; that the ship was not reasonably fit to carry a reasonable cargo of wet sugar; that the ship could not have been made fit within such a time as would not have frustrated the object of the adventure; and that the ship would not, without new pumps, and with a reasonable cargo of wet sugar on board, have been seaworthy:

Held, that the shipowner, by entering into the charterparty, undertook that the ship should be reasonably fit for the carriage of a reasonable cargo of any of the kinds of goods specified in the charterparty, and consequently of a reasonable cargo of wet sugar; and that upon the finding of the jury that she was not so fit, and could not be made so in such a time as not to frustrate the object of the voyage, the charterer was entitled to succeed in both actions.

CROSS actions upon a charterparty between the owner and the charterer of a ship called the *Isle of Wight*.

*The first count of the declaration in the action by the [422 shipowner against the charterer (*Stanton v. Richardson*) set out terms of the charterparty, and alleged as breaches that the defendant neglected and refused to load a full and complete cargo on board the ship, and that he neglected and refused to pay the freight. The second count alleged as a breach of the charterparty that the defendant loaded a large portion of the cargo, to wit, sugar in bags, and the same was afterwards properly and necessarily for the safety of the ship and cargo landed by the master at the port of lading, on account of the part thereof being in a damaged state in the hold of the vessel, and that all conditions were performed, &c., necessary to entitle the plaintiff to reload the said portion of the said cargo, and to have the residue of the cargo supplied; yet the defendant refused to allow the said portion to be reloaded and to supply the residue. The third count was similar to the second. The fourth count alleged as a breach of the charterparty that, though a large portion of the cargo consisting of sugar in bags, was loaded on board the ship by the defendant, a portion of it was in such a bad, dangerous, and unfit state, for conveyance in the ship that the same damaged and injured the ship and her pumps, and also the residue of the sugar, so that the ship could not safely set sail and proceed on her voyage, whereby, &c. Fifth, money counts.

The pleas were the ordinary traverses of the allegations of the declaration, &c., with the exception of the third plea, which alleged that the vessel was not tight, staunch, and strong, or fit to receive and carry a cargo as she was required to be according to the true intent and meaning of the charterparty, and that the defendant could not, although he was ready and willing so to do, safely or securely load on board the ship a full and complete, or any cargo; and by reason of the condition of the ship was prevented from deriving any benefit from the charterparty, and the consideration for the same wholly failed.

Issues.

In the action by the charterer against the shipowner (*Richardson v. Stanton*) the first count of the declaration set out the charterparty, and alleged as a breach that the master did not take all proper means to keep the ship tight, staunch, and strong, well manned and sound, and in every way fitted for the voyage; and *that the ship at the time of receiving the cargo on [423 board was not a good risk for insurance, and did not load or carry a full and complete, or any cargo, according to the charterparty, whereby the plaintiff lost the benefit of the charter, and was put to great expense in landing the cargo and ware-

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housing the same, and was compelled to ship the cargo by another vessel; and a portion of the cargo which had been loaded on board the ship was either wholly lost or much damaged and injured, &c. Second and third counts respectively alleged bailments of certain goods to defendant for carriage in his ship, and damage to the goods through the negligence of the defendant and his servants, and through the defective and unseaworthy condition of the defendant's ship. Fourth, money counts.

Pleas: The ordinary traverses, &c.

Issues.

The charterparty, so far as material, was as follows; it was therein agreed between the master of the ship called the *Isle of Wight*, for and on behalf of himself and the owner of the said vessel of the one part, and the Borneo Company, limited, as agents for and on behalf of the charter, of the other part, that the said master should, after having discharged his inward cargo with all proper despatch, "sail for Manilla, or as near thereunto as he might safely get, for orders to load within there or at Yloilo or at Zebu, the following cargo of lawful merchandise, &c.: a full and complete cargo of sugar in bags, hemp in compressed bales, ^{and} measurement goods, always sufficient dead weight to ballast the vessel;" and that the vessel, being so loaded, should sail to Cork or Falmouth for orders to discharge in a port in the United Kingdom or in Europe, between Havre and Hamburg. The provisions concerning rate of freight specified that the rate should be 4*l.* 2*s.* 6*d.* for dry sugar, and 4*l.* 5*s.* for wet sugar, and 4*l.* 15*s.* for hemp and measurement goods. The charter did not commence with the usual clause as to the vessel's being tight, staunch, and strong, but contained this provision: "The master engages that the vessel, before and when receiving cargo, shall be a good risk for insurance; and he will, when required, provide a survey report declaring her to be so; and during the voyage the master shall take all proper means 424] to keep the vessel tight, staunch, and strong, *well manned and provided, and in every way fitted and provided for the voyage."

At the trial before Brett, J., at the sittings in London after Hilary Term, the facts were as follows: The *Isle of Wight* proceeded to Manilla, and thence, in accordance with orders given by the charterer's agents, to Yloilo, which is in the Philippine Isles. At Yloilo she was surveyed, in pursuance of the terms of the charterparty, and reported to be a first class risk and fit to carry a dry and perishable cargo to any part of the world. A cargo of what is known as wet sugar, in bags, was provided for her by the charterer. It appears that a very large quantity of moisture drains from cargoes of wet sugar, and when the bulk

of the cargo had been loaded it was found that there was such a large accumulation of molasses in the hold, the result of drainage from the sugar, that the ship would not be seaworthy for the voyage if she proceeded in her then condition. An attempt was made to get rid of the drainage by means of the ship's pumps. The pumps were of the usual kind for a ship of the size of the *Isle of Wight*, and quite sufficient for ordinary purposes, but, owing to the depth of the ship's hold, and the nature of the material, they were unable to deal with the drainage from the sugar. The ship was perfectly seaworthy, excepting with respect to this particular cargo of wet sugar and the insufficiency of the pumps to deal with it. It ultimately became necessary to unload the cargo again and warehouse it at Yloilo, whence it was afterwards, by arrangement between the parties, sent to Europe in another ship called the *Milton*. The charterer refused to provide another cargo. It appeared that there was no means of procuring any other pumps for the purpose of pumping out the drainage from the sugar except by sending for them to Manilla, and it would have taken a very considerable period—probably seven or eight months—before they could be so procured.

The following were the questions left to the jury, and the answers given by the jury to them:—1. Did the charterer in the first place offer a full cargo?—Yes. 2. Did the charterer refuse to allow the cargo to be reshipped, or any cargo, after the first was discharged, to be shipped and carried in the *Isle of Wight*? Yes. 3. Was the cargo shipped on board the *Milton* by mutual consent?—Yes. *4. Was the sugar which was offered [425 to the captain a reasonable cargo to be offered?—Yes. 5. If not, was the defect such, and so apparent, that a captain of ordinary care and skill, if he meant to object to it, ought to have rejected it? 6. Was the ship fit to carry the cargo which was offered to her?—No. 7. Was the ship fit to carry a reasonable cargo of Yloilo wet sugar?—No. 8. Did the captain use reasonable skill and care in the treatment of the cargo delivered to him? No. 9. Was the damage suffered by the sugar the result of its own defective condition, without any defect in the ship or any fault of the captain?—No. 10. Was the damage to the sugar caused by the unfitness of the ship to carry the cargo offered to her, or by the ship being unreasonably unfit to carry a reasonable cargo of Yloilo wet sugar, or by want of reasonable care or skill of the captain in treating the cargo delivered to him?—Yes. 11. If the ship was defective, was the captain willing and able to make her fit within a reasonable time?—Willing, but not able.—12. Was he willing and able to make her fit within such a time as would not have frustrated the object of the ad-

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venture?—Willing, but not able. 13. Would the ship, without new pumps, and having the sugar which was offered to her on board, have been seaworthy?—No. 14. Would the ship, without new pumps, and with a reasonable cargo of Yloilo sugar on board, have been seaworthy?—No.

Upon these findings the learned judge directed the verdict to be entered for the charterer in both actions, and reserved leave to the shipowner to move to enter a verdict, the Court to be at liberty to make all amendments that the judge ought to have made. It was agreed that the damages in both actions should be referred.

A rule nisi was obtained to enter the verdict pursuant to the leave reserved, on the ground that Richardson, the charterer, had no right to throw up the charterparty and refuse to load a cargo, and that, upon the findings of the jury, Stanton, the shipowner, was entitled to have the verdict entered for him, and also for a new trial on the ground of misdirection on the part of the judge in directing a verdict to be entered for Richardson upon the findings of the jury, and in telling the jury that there was a warranty on the part of the shipowner that the ship was fit to carry a reasonable cargo of Yloilo wet sugar, and that 426] there was an obligation on the part of the *shipowner and master of the ship to have the ship in a state fit for such a cargo, and that the master should possess the necessary knowledge enabling him to deal with and manage such a cargo, and in telling the jury that the shipowner was bound within a reasonable time to make the ship fit to take such a cargo, and to do so within such a time as would not frustrate the objects of the adventure, or upon the ground that the verdicts were against the weight of the evidence—first, in the answers given by the jury to the 6th, 7th, and 14th questions; secondly, in the answers to the 8th, 9th, and 10th questions; and thirdly, in the answers to the 11th and 12th questions.

Sir J. Karlake, Q.C., Butt, Q.C., and J. C. Mathew, showed cause. The charterparty clearly specifies wet sugar as one of the kinds of cargo which may be loaded under it. The jury have found that the cargo offered was a reasonable one. It is contended that the shipowner is bound to provide a ship reasonably fit for the purpose of carrying any of the specified cargoes which he has undertaken to carry, and the charterer is under no obligation to provide a cargo of the sorts specified which may be suitable to the particular ship. It must be admitted that compliance with a warranty is not always and in all cases a condition precedent; but here the jury have found that the objects of the voyage were wholly frustrated. The cases establish that when the defect in the ship or the breach of contract

on the shipowner's part goes to the whole consideration there is an answer to an action for refusing to load: *Tarrabochius v. Hickie* ⁽¹⁾; *Behn v. Burness* ⁽²⁾; *McAndrew v. Chapple* ⁽³⁾. There is an express condition in this charterparty that the ship shall be a good risk for insurance at the time of receiving the cargo; this shows that it was intended that the vessel should be seaworthy with regard to the particular cargoes specified. Apart from this there would be a warranty of seaworthiness in respect of the cargoes specified in the charter. The shipowner relies on the analogy of a specific chattel purchased, as to which it is not a condition precedent that it shall be fit for a particular purpose. That is not a true analogy; the case more *nearly [427 resembles that of a contract to provide goods which shall answer a certain description and be fit for a certain purpose: see *Brown v. Edgington* ⁽⁴⁾. *Shepherd v. Pybus* ⁽⁵⁾; *Jones v. Just* ⁽⁶⁾.

It may be difficult to find any distinct statement in the text books that the ship at the time of loading must be fit to receive the particular cargo specified in the charter, but it is clear that the shipowner's liability goes even further than that. See the observations of Blackburn, J., in *Redhead v. Midland Ry. Co.* ⁽⁷⁾. The distinction was drawn in that case between carriers by land and by sea, and Lush, J., at p. 418, says, "as to the shipowners, I agree that there is abundant authority for the doctrine laid down." It cannot be that the charterer is bound to load a cargo on board a ship that is unseaworthy or not fit to receive it, as, for instance; to put silk into a ship that is leaky. Therefore the charterer here was not bound to load, or, the cargo having been unloaded, to reload while the ship was in her then state; and as the jury have found that she could not have been fitted to receive the cargo in such time as not to totally frustrate the objects of the voyage he was absolved from the obligation to provide a cargo altogether, and was entitled to recover damages for the breach of contract on the part of the shipowner.

They also cited Bell's Commentaries on the Laws of Scotland, s. 499; Pothier, Charterpartie, 30; Parsons on Shipping, 285; *Thompson v. Gillespy* ⁽⁸⁾; *Burgess v. Wickham* ⁽⁹⁾; *Knill v. Hooper* ⁽¹⁰⁾; *Thorne v. Henderson* ⁽¹¹⁾; *Lyon v. Mells* ⁽¹²⁾; *Gibson v. Small* ⁽¹³⁾; Abbott on Shipping, 5th ed. p. 218, 10th ed., by Shee, 254; *Freeman v. Taylor* ⁽¹⁴⁾; *Clipsham v. Vertue* ⁽¹⁵⁾.

⁽¹⁾ 1 H. & N., 183; 26 L. J. (Ex.), 26.

⁽²⁾ 3 B. & S., 751; 32 L. J. (Q.B.), 204.

⁽³⁾ Law Rep., 1 C. P., 643.

⁽⁴⁾ 2 Man & G., 279.

⁽⁵⁾ 4 Scott, N. R., 434.

⁽⁶⁾ Law Rep., 3 Q.B., 197.

⁽⁷⁾ Law Rep., 2 Q.B., 433-437.

⁽⁸⁾ 5 E. & B., 209.

⁽⁹⁾ 3 B. & S., 669; 33 L. J., (Q.B.), 17.

⁽¹⁰⁾ 2 H. & N., 277; 26 L. J. (Ex.), 377.

⁽¹¹⁾ 4 Ex., 890; 19 L. J. (Ex.), 163.

⁽¹²⁾ 5 East, 427.

⁽¹³⁾ 4 H. L., 353.

⁽¹⁴⁾ 8 Bing., 124.

⁽¹⁵⁾ 5 Q. B., 265; 13 L. J. (Q.B.), 2.

Henry James Q.C., Watkin Williams, and Cohen, supported the rule. The first question is whether the shipowner was bound to provide a ship fit to carry such a cargo as was offered. The 428] *jury have not found that the cargo was a reasonable cargo in relation to this particular ship. The ship was perfectly seaworthy in the ordinary sense of the term, and could have carried any ordinary cargo. The pumps were in good order and fit for ordinary purposes. It is contended that the shipowner was not bound to alter the construction of the ship in order to take one particular sort of cargo for which she was not adapted. The charterparty specifies that the charterer may load various cargoes of lawful merchandise; that must be taken to mean of a kind suitable to the ship. The charterer must be taken to know what the nature of a cargo of wet sugar is, and may satisfy himself if he will whether the ship is suitable for carrying such a cargo before he charters her. He is not entitled to throw on the shipowner the necessity of altering the construction of the vessel to take a cargo of an exceptional character, the peculiar nature of which the shipowner is not likely to know when he enters into the contract. The specification of the cargo in a charterparty must be taken to refer to a cargo of an ordinary description. Suppose the charter specified a cargo of machinery, would the charterer be entitled to tender a cargo consisting of pieces of machinery of enormous size which could not be got into the hold without altering the construction of the ship? The charterer is bound to supply a cargo within the terms of the charter that the vessel can carry. The case is like that of a purchase of a specific chattel, the charterer of the ship must be taken to hire the ship as she is for a particular purpose, and the shipowner is only bound to fulfil that purpose so far as the vessel she is can do so.

[BRETT, J. That construction of the charterparty appears to me to destroy the option which was expressly given to the charterer. Considerations derived from the knowledge or ignorance of the parties before entering into the contract seem immaterial when we are dealing with the terms of a written contract.]

With respect to the finding of mismanagement on the part of the master with regard to the cargo the same considerations apply. The obligation on him to bring skill and knowledge to the treatment of the cargo applies only to an ordinary, and not an exceptional, cargo. Secondly, it is not a condition precedent 429] to the *obligation to load that the vessel should be seaworthy at the time of loading, or the smallest defect which could be easily remedied before sailing would be fatal.

[BOVILL, C.J. Must she not be fit to receive the cargo?]

In order to entitle the charterer to repudiate the obligation

of loading a cargo it must be shown that the ship could not be of any use whatever to him; otherwise the whole consideration has not failed, and his remedy is by cross action for any damage he may have suffered: *Behn v. Burness* ⁽¹⁾. The ship could have taken a cargo of any of the kinds specified in the charter except the exceptional cargo of wet sugar. It is sufficient if the charterer may derive any benefit from the ship, with respect even to such a cargo, though the delay would have been considerable, she might have been rendered fit. The whole purpose of the adventure must be rendered impossible to exonerate the charterer: *MacAndrew v. Chapple* ⁽²⁾; *Turrabochia v. Hickie* ⁽³⁾; *Dimech v. Corlett* ⁽⁴⁾. This was a charterparty by which the ship was to go and take a cargo of the produce of the place, not a particular specific cargo which had been produced for her. It is contended that even if the charterer would have been entitled in the first instance to refuse to load on the ground that the ship was not fitted with sufficient pumps for a cargo of wet sugar, having loaded the sugar he had waived the condition precedent and could not reject the ship because the parties could not be placed in statu quo.

[BRETT, J. The loading was no benefit to the charterer.]

They also cited *Blasco v. Fletcher* ⁽⁵⁾.

BOVILL, C. J. The verdict in both these actions was for the charterer, the defendant in the first action and the plaintiff in the second. A rule was obtained on behalf of the shipowner to enter a verdict for him in both actions on the findings of the jury or for a new trial on the ground of misdirection, and that the verdict was against the evidence. After hearing the evidence that was given read over, I am of opinion that the findings of the jury were in accordance with the evidence. My [430 brother Brett is not dissatisfied with the verdict, and, on the whole, it does not appear to me that there is any sufficient ground for disturbing the verdict on any of the questions that were left to the jury. With regard to the motion to enter a verdict, or for a new trial on the ground of misdirection, the matter depends upon the relative obligations of the shipowner and the charterer. The facts with reference to this question are undisputed. The ship was good and sound enough for ordinary purposes, and the cargo was a proper cargo for a ship that was suitable to carry it. The charterparty into which the parties entered was not quite in the ordinary form with regard to the fitness of the ship. The usual terms do not occur in the beginning, but the contract, which is between the master of the

⁽¹⁾ 8 B. & S., 752; 32 L. J. (Q. B.), 204. ⁽²⁾ 1 H. & N., 183; 26 L. J. (Ex.), 26.

⁽³⁾ Law Rep., 1 C. P., 643. ⁽⁴⁾ 12 Moo. P. C., 199.

⁽⁵⁾ 14 C. B. (N. S.), 147; 32 L. J. (C.P.), 284.

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one part. on behalf of the owner and the agents of the charterer of the other part, is, that the master after having discharged his inward cargo shall sail for Manilla for orders to load within there, or at Yloilo, &c., the following cargo of lawful merchandise, a full and complete cargo of sugar, in bags, hemp in compressed bales, ^{and} ~~or~~ measurement goods. In that part of the charter nothing is said as to the nature of the sugar, but in the clause relating to the rate of freight it is provided that the rate shall be 4*l.* 2*s.* 6*d.* for dry sugar, and 4*l.* 5*s.* for wet sugar. Towards the end of the charter is this engagement by the master, "that the vessel before and when receiving cargo shall be a good risk for insurance, and he will, when required, provide a survey report declaring her to be so, and during the voyage the master shall take all proper means to keep the vessel tight, staunch, and strong, well manned and provided, and in every way fitted and provided for the voyage." Under this charter the charterer was clearly at liberty to offer a cargo of wet sugar. He was clearly at liberty to load the ship at Yloilo. It appears to be well understood that the sugar which is there is wet sugar, of such a description that there is a considerable drainage from it of molasses and moisture. Under such a charter there is no doubt that the cargo offered must be a reasonable cargo of the description specified, but I am not aware of any authority to support the proposition that the charterer is bound to offer a cargo suitable to the particular ship in the state in which she is 431] at the time of loading. The only *limit with respect to the nature of the cargo which the charterer may ship appears to be that of reasonableness.

Mr. James suggested as an illustration of his contention, the offer of exceptionally large pieces of machinery or heavy guns under a charter which simply provided for a cargo of merchandise. The answer to the argument derived from that illustration appears to be that in such a case the jury would probably say that such a cargo was not a reasonable cargo to offer; that seems to me the only mode in which such a case could be disposed of. Another illustration may be taken. Suppose the charter provided for a cargo of cattle, could it be said that the charterer was bound to offer a cargo of cattle suitable to the ship in the state in which she was at the time? If the ship were not properly fitted to receive a cargo of heavy cattle is the charterer to be bound to provide a cargo of light cattle? I think the ship must be fit to receive any reasonable cargo of the nature that the shipowner undertook to carry. The jury in the present case found that the sugar offered was a reasonable cargo to be offered. They have also found that the ship was not reasonably fit to carry a reasonable cargo of Yloilo sugar. There

is a further finding that the captain, though willing, was not able to make the ship fit to carry the cargo within a reasonable time, or within such a time as not to frustrate the object of the adventure. The reason of the unfitness of the ship arose from the nature of the sugar and the character of the pumps. If the cargo had remained on board or had been reloaded, the pumps being wholly unequal to dealing with the accumulation of the drainage from the sugar, the safety of the vessel would have been endangered and the cargo wholly ruined rendered unmerchantable. The jury having found that the vessel was not only unfit, but that she could not be made fit in such time as not to frustrate the object of the adventure, the question arises what is the obligation of the shipowner with reference to a ship chartered to carry a particular sort of goods? It seems to me that he is bound to furnish a vessel fit to carry the cargo that the charterer has undertaken to put on board. There are additional terms in this charter, viz., as to what is to be done during the voyage, and that the vessel is to be a good risk before and at the time of receiving the cargo. The jury found that the ship, at such time, *was unfit to receive the [432] cargo. Is there any obligation under such circumstances, on the charterer to load, or if, having been loaded, the cargo is obliged to be immediately discharged as here to reload? The question appears to me to answer itself. The charterer is not bound to load or reload unless the ship is fit to receive the cargo and carry it. It was said that there was an absence of authority as to the exact obligation of the shipowner in relation to these questions. This may arise from the absence of doubt as to the nature of such obligation. There seems to me, however, to be sufficient authority for the propositions for which I am now contending. Lord Ellenborough in the case of *Lyons v. Mells* (¹), says: "In every contract for the carriage of goods between a person holding himself forth as the owner of a lighter or vessel ready to carry goods for hire, and the person putting goods on board or employing his vessel or lighter for that purpose, it is a term of the contract on the part of the carrier or lighterman, implied by law, that his vessel is tight and fit for the purpose or employment for which he offers and holds it forth to the public."

It is true that these observations apply chiefly to persons following a public employment, and are made on the footing that the nature of such employment will be a guide to what the contract must be between the parties. But in a later case, before Lord Ellenborough, a similar question arose under a charter party. That case is *Havelock v. Geddes* (²). Lord Ellenborough there says, "Had the plaintiffs' neglect here precluded the de-

(¹) 5 East, 429.

(²) 10 East, 564.

endants from making any use of the vessel, it would have gone to the whole consideration, and might have been insisted on as an entire bar." That was because the consideration would then have wholly failed. Here the jury found that what occurred did wholly frustrate the objects of the voyage, and so this case comes distinctly within the doctrine laid down in the passage I have cited. It was argued by Mr. Williams that this doctrine about frustrating the objects of the voyage was a new doctrine, introduced by the case of *Turrabochia v. Hickie* ⁽¹⁾. This is not really so in my opinion. Several other cases, establishing the 433] same principle, have been referred to in *the argument, which are much older than *Turrabochia v. Hickie* ⁽¹⁾, and especially the case of *Freeman v. Taylor* ⁽²⁾. The question there was one of deviation. Tindal, C.J., laid it down to the jury that if the deviation were so long and unreasonable as that in the ordinary course of mercantile business it would frustrate the whole object of the voyage, the contract was at an end. He left the case to the jury precisely as my brother Brett left the present case, and the court, after taking time to consider, upheld his ruling. The same doctrine may be traced back as far as the case of *Constable v. Cloberrie* ⁽³⁾, where the covenant was to sail with the first wind. It appears to me, therefore, in the present case, that the object of the voyage being frustrated, the charterer was not bound to load a cargo. It is true that he did load a cargo in the first instance, but after it was so loaded it had to be removed from the vessel, because she was unfit to carry it. It appears to me that the same reasoning applies to the question whether he was bound to reload, as applies to the question of his obligation to load. The question may be regarded from another point of view. When there are concurrent acts to be performed on each side, as, for instance, where one is to receive cargo and the other to deliver it, the party who claims as for a breach of the contract must have been ready and willing to do his part. The jury having found that the ship could not be made fit within a reasonable time, or such a time as that the object of the voyage would not be frustrated, that finding appears to me to amount to a finding that the shipowner was not ready and willing to receive the cargo offered. For these reasons, I think the verdicts must stand, and the rule be discharged.

BYLES, J. I am of opinion that in these cross actions the charterer is entitled to the judgment of the court, and to hold his verdicts. In other words, that the ship was to blame, and not the sugar.

The charterparty provides in express terms that wet sugar may be shipped, but at a higher rate of freight than dry sugar.

(1) 1 H. & N., 183; 26 L. J. (Ex.), 20.

(2) 8 Bing., 124.

(3) Palm., 397.

The evidence shows that the ship's pumps were of such a height, *diameter, and description, that they would not and did [434 not discharge the water mixed with the drainage of the wet sugar. The ship, therefore, was not, in respect of the pumps, reasonably fit to carry the goods; that is to say, the wet sugar she had contracted to carry. The charterer knew nothing of the existing pumps, neither their power nor their capacity. The shipowner or captain was bound to know, and did know. The charterer, perhaps, knew nothing of the disproportion of the thick drainage to the power of the pumps. The jury have found the negligence to be in the shipowner.

My brother Brett's directions, which were in accordance with this view of the case, seem to me unassailable. The judge is not dissatisfied with the verdicts in these cases, and therefore they must stand.

BRETT, J. It seems to me that three questions arise in this case: first, whether the correct questions were left to the jury; secondly, if so, and they were properly answered, what is the effect of such answers on the rights of the parties? thirdly, whether they were properly answered? The answer to the first question depends on the question, what the rights and obligations of the parties are. It appears to me that they must be determined by the written contract, the construction of which is for the court, without regard to any consideration as to the knowledge of either party, and with respect to the character of the ship or cargo. Such considerations are immaterial with regard to a written contract. The contract is a charterparty, by which the charterer is to have the option of loading a full and complete cargo of sugar, in bags, hemp, in compressed bales, ^{and} measurement goods. This stipulation giving an option as to the nature of the cargo, is in favor of the charterer. Amongst the things which the charterer has the option of shipping is a cargo of wet sugar. The shipowner undertakes to carry such a cargo. In addition, the shipowner took on himself the obligation to provide a vessel that should be a good risk for insurance, and procure a survey report declaring her to be so. It was urged that, by virtue of that stipulation, the shipowner was bound to provide a ship that was seaworthy when the cargo was on board or whilst loading. I should be sorry to rest my decision on that express undertaking. *I think [435 the question turns on another undertaking, not express, but implied. I admit that some of the questions that were put to the jury may not, in point of form, define with perfect strictness the obligations of the shipowner, and the rights of the charterer, but it appears to me that, taking all the questions together, in substance the case was correctly presented to the jury.

It is found that the cargo offered was a reasonable cargo, and that the ship was not fit to carry a reasonable cargo; and therefore the answers to questions 6 and 7, become in the event equivalent to one another. What then is the effect of these findings, considered with regard to the reciprocal duties arising between the charterer and shipowner from the mere fact of their having entered into an ordinary charterparty? It seems to me that the obligation of the shipowner is to supply a ship that is seaworthy in relation to the cargo which he has undertaken to carry.

I do not think, however, that this proposition completely expresses his liability, though the proposition I am about to state with regard to such liability in many cases may amount to the same thing only in effect. I think the obligation of the shipowner is to supply a ship reasonably fit to carry the cargo stipulated for in the charterparty. This appears to be the measure of his liability as stated in the case of *Lyon v. Mells* ⁽¹⁾ by Lord Ellenborough, and by Lord Wensleydale in the case of *Gibson v. Small* ⁽²⁾, and again by Lord Ellenborough in *Harclock v. Geddes* ⁽³⁾. The same rule is adopted in the edition of Abbott on Shipping, by Mr. Justice Shee, and by Blackburn, J., in the case of *Redhead v. Midland Ry. Co.* ⁽⁴⁾.

It is argued that the charterer is bound to ship a cargo that is suitable for the particular ship. That would be to destroy the option that is expressly reserved by the charterparty to him. With all the assistance rendered to me by counsel, I can find no more decisive mode of stating the true proposition with regard to the duties of the charterer and shipowner, than that the one must offer a reasonable cargo of the kind specified in the charter, and the other must provide a ship reasonably fit to carry such a reasonable cargo. In truth it often happens in juris-
436] prudence, that the *law can lay down only such general rules, leaving the application of them to the particular facts to be determined by the findings of the jury. If such be the rights and duties of the parties, what is the effect as to these two actions? With respect to the action by the charterer, he sues for damages for not providing a ship according to the charter. For the purposes of that action, it is sufficient to hold that, by reason of the unfitness of the ship, there was a breach of contract, and all damages necessarily occasioned by such breach of contract, e.g. damage to the sugar, and expenses, are recoverable.

With regard to the action for not loading or not reloading, the further question arises, whether, under the circumstances, the charterer had a right to refuse to load or reload. In this

⁽¹⁾ 5 East, 427.

⁽²⁾ 4 H. L., 353.

⁽³⁾ 10 East, 536.

⁽⁴⁾ Law Rep. 2 Q. B., 413.

action we must decide whether there was not only a breach of contract, but such a breach of contract as entitled the charterer to refuse to load or reload. The question in such cases is said to be whether the warranty was a condition. I apprehend that a stipulation amounting to a condition is necessarily also a warranty, and there may be circumstances preventing its being treated as a condition, and then it is only available as a warranty; as, for instance, when the stipulation is that the ship shall be ready to load within a fixed time or a reasonable time, and the cargo is loaded and carried; though before loading this might be a condition precedent, inasmuch as the charterer has loaded and derived benefit from the charter, he cannot rely on it as a condition, but must treat it as a warranty. The question, therefore, here is, whether the unfitness of the ship may be treated as a breach of a condition precedent; that is to say, whether it amounted to a breach of contract entitling the charterer to refuse to load or reload. I think the questions as to loading or reloading are the same, for in my opinion the effect of the agreement between the parties was that the matter should be treated as if the charterer had a cargo ready to load and refused to load it. Now assuming that to be so, and the findings to be correct, the jury have found that the ship was not reasonably fit to carry the cargo, and that she was so unfit as to be unseaworthy with the cargo on board. But it is not necessary to decide whether the charterer would be entitled on account of such unfitness and unseaworthiness to reject the ship at once, for the *jury have gone further, and found that [437 not only was the ship unfit and unseaworthy, but also that she could not be made reasonably fit and seaworthy, not only within a reasonable time but within such a time as would not entirely frustrate the whole adventure. It seems to me that the conclusion to be drawn from all the cases analogous to this is, that if the breach of contract by the shipowner be such as to justify the charterer in not putting the cargo on board at the moment of the breach, and it cannot be remedied within such a time as not to frustrate the object of the voyage, this absolves the charterer altogether. It would be a gross injustice if it were otherwise. The charterer must be taken to have entered into the contract with the usual mercantile objects of such a contract which objects must be taken to be known also to the shipowner, and it cannot be that the shipowner is to hold the charterer to his bargain if those objects are frustrated.

If in such a case as the present he were bound to put the cargo on board in the first instance, he clearly was not bound to reload after what occurred.

The only remaining question is whether the findings of the

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jury were against the evidence, and with regard to this question I cannot say that after the case was fully gone into there appeared to me to be much difficulty with regard to the facts. It seems to me that the verdicts ought not to be disturbed. For these reasons I think that the rule should be discharged.

Rule discharged.

Attorneys for charterer: *Wallons, Bubb, & Walton.*

Attorneys for shipowner: *Thomas & Hollams.*

June 5, 1872.

438] *HEILBUTT and others v. HICKSON and others.¹

[Law Reports, 7 Common Pleas, 438.]

Sale of Goods by Sample — Right to reject Goods not in accordance with Contract, and recover Price paid for them — Acceptance.

The defendants being shoe manufacturers contracted with the plaintiffs to supply 30,000 black army shoes as per sample, to be delivered free at a wharf, to be inspected and quality approved before shipment, and payment to be made in cash at the time of each delivery. It was well known to the defendants that the shoes were required for the French army for a winter campaign. A sample shoe was deposited, and a large number of shoes having been inspected and approved by the plaintiff's agent under the contract, invoices for such shoes were made out and signed by the plaintiff's agent, and the shoes were then sent to Fenning's Wharf, London, which had been named by the plaintiffs as the place for delivery. On the inspection of the shoes the soles were not opened, and without opening them it was impossible to tell what the "fillings" of the soles consisted of. The shoes were paid for by the plaintiffs and forwarded by them to Lille, for the purpose of meeting a contract entered into with the French government for the supply of shoes for the French army. Circumstances had in the mean time occurred which gave rise to suspicions on the part of the plaintiffs that the shoes so forwarded might contain paper in the soles; and the defendants knowing at that time that the shoes were intended to be sent to Lille under a contract for the supply of shoes to the French army, and would have to be passed by the French authorities there, signed a letter to the plaintiffs agreeing to take back the shoes that might be thrown on their hands in consequence of paper being found in them, it being understood that they would not take back any large number of shoes if paper should be found in only a few pairs. The shoes were tendered to the French authorities at Lille, and rejected because a great number of pairs were found on being opened to contain paper. A considerable number of the shoes being afterwards opened, a very large proportion of those so opened were found to contain paper in the soles. Shoes with paper in the soles are not fit for army shoes. A small quantity of shoes, which had been inspected and approved under the contract, and the price of which had been paid, had been delivered at Fenning's Wharf and not forwarded to Lille. The plaintiffs gave notice to the defendants that they rejected the shoes delivered, and refused to receive any more, and brought an action against the defendants for breach of contract, claiming to be entitled to throw the shoes already delivered under the contract upon the defendants' hands at Lille and at Fenning's Wharf, and to recover (inter alia) the amount of the price of the shoes. The jury found at the trial that the defects in the shoes could not have been discovered by any inspection which ought reasonably to have been made:

Held, that the letter of the defendants must be treated as a new and additional contract between the parties, adding fresh terms to the original contract with reference to the difficulties that were likely to arise with the French authorities

(¹) See *ante* *Couston vs. Chapman*.

at Lille, and upon the proper construction of the whole contract, including the letter, the plaintiffs were entitled to throw the shoes on the defendants' hands at Lille and at Fenning's Wharf, and recover the price of them.

Per Bovill, C.J., and Byles, J., but for the letter, and under the contract [439 as it originally stood, the plaintiffs could not have rejected the shoes and recovered the price of them, having accepted them and dealt with them as their own property.

Per Brett, J. Apart from the special agreement contained in the letter, the plaintiffs would have been entitled to return the shoes on the defendant's hands at Lille, and to recover the price of them, inasmuch as the inspection in London was ineffectual by reason of a latent defect for which the defendants as manufacturers of the shoes were responsible, and the shoes were rejected immediately upon opportunity occurring for the discovery of such defect.

THIS was an action for breach of a contract by the defendants, who were boot and shoe manufacturers, to supply 30,000 army shoes to the plaintiffs (¹).

The trial took place before Brett, J., in London, when the verdict was entered for the plaintiffs for 4214*l.* 5*s.* damages, leave being reserved to the defendants to move to reduce the damages to such sum as the Court might think fit.

The facts of the case are fully stated in the judgment of the Court. The main question raised was whether the plaintiffs, under the circumstances of the case, could reject the shoes which had been delivered and paid for under the contract, as not answering the description contracted for, and recover back the price.

A rule nisi was obtained (*inter alia*) to reduce the damages, pursuant to the leave reserved, on the ground that there was an acceptance by the plaintiffs of the goods delivered, that by the dealings by the plaintiffs with the goods the plaintiffs were precluded from recovering except for a breach of warranty, and that the plaintiffs could not recover the price of the goods delivered and paid for except on returning such goods.

May 25, 27, 30, 31. *Sir J. B. Karlake, Q.C., Watkin Williams, and McLeod*, showed cause. The shoes not being in accordance with the contract the plaintiffs were entitled to throw them upon the defendants' hands at Lille, and recover the price they had paid for them. The inspection in England was ineffectual by reason of a defect in the goods which the plaintiffs could not discover by *inspection, and the defendants being the [440 manufacturers of the goods were responsible for such defect. The plaintiffs were, therefore, entitled immediately upon the discovery of the defect, to return the goods. No inspection could have been made which would have detected the defect without the destruction of the article inspected. The jury have

(¹) It is not considered necessary to set out the pleadings, inasmuch as it was agreed that the Court should consider the question which related to the proper measure of damages recoverable for the breach of contract, apart from any question of pleadings.

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found that no reasonable inspection would have detected it. The property does not pass by the sale; the moment that the plaintiffs were aware of the character of the shoes they rejected them. *Bunnerman v. White* ⁽¹⁾; *Street v. Blay* ⁽²⁾; *Okell v. Smith* ⁽³⁾; notes to *Cutter v. Powell* ⁽⁴⁾.

[BOVILL, C.J. Did not the property in the shoes pass upon their inspection, approval, and delivery in England and the payment of the price? Can the plaintiffs be entitled to reject the goods after they have dealt with them as their own and forwarded them to Lille?

BRETT, J. It must be admitted that but for the nature of the defects, which could not have been discovered by any reasonable inspection, there would have been an acceptance in England, and the property would have passed.]

The goods were taken into the plaintiffs' possession, but not conclusively accepted. It is contended that under the circumstances the property had not indefeasibly passed. The rule to be derived from the authorities is, that, if a buyer accepts the goods and treats them as indefeasibly his property, he is remitted to his cross action if there be a breach of warranty, and cannot return the goods; but if he only receives them and keeps them such a time as is necessary for a fair examination, he is to be considered as not having received them. Here the plaintiffs did not take an unreasonable time in finding out the defect. The conduct and representations of the defendants prevented them from repudiating the goods earlier. The present case comes within the qualification in *Street v. Blay* ⁽²⁾, which admits of the right to reject the goods provided that the purchaser has done nothing more in the mean time than was necessary to give them a fair trial.

[BOVILL, C.J. Is it not essential to the right to reject that the
141] *parties can be put in statu quo? The plaintiffs sent these goods to France and claim to reject them there.]

It is submitted that the word "return" as used in the cases means "reject," and that the party rejecting the goods as not being in accordance with the contract, cannot be bound to send them back, at any rate if they are not small parcels but articles of great bulk like a steam engine or a cargo of wheat. He is entitled to say to the party in default, "I reject them, and they lie at your risk." It is submitted that the defendants' letter of the 11th of February, being written when they had full knowledge that the goods were to go to Lille and were to be inspected by the French authorities, clearly gave the plaintiffs a right to

(1) 10 C. B. (N.S.), 844; 31 L. J. (C.P.). (2) 1 Stark., 107.
28. (3) 2 Sm. L. C., 6th ed., 1, 26.
(4) 2 B. & Ad., 456.

reject the goods at Lille even if they could not have done so under the original contract.

It is contended with respect to the goods that were not forwarded to Lille that they clearly may be rejected and their price recovered.

[They also cited *Mondel v. Steel* ⁽¹⁾; *Hunt v. Silk* ⁽²⁾; *Clarke v. Dickson* ⁽³⁾; *Blackburn v. Smith* ⁽⁴⁾; *Nichol v. Godts* ⁽⁵⁾; *Allan v. Lake* ⁽⁶⁾; *Head v. Tattersall* ⁽⁷⁾; *Makin v. Rice Mill Co.* ⁽⁸⁾.

Parry, Serjt., Butt, Q.C. and *Russell*, Q.C., supported the rule. The plaintiffs had no right to reject these goods. It is clear, upon the authorities, that the property in the shoes, both those forwarded to Lille and those not so forwarded, had passed to the plaintiffs. But for the fact of notice to the defendants for what purpose the goods were required, and the defect being a latent defect, there could be no question that the plaintiffs could not return the goods after dealing with them as they have done. It is submitted these facts make no difference in principle. The property would not, it is true, pass by the mere contract, as these were not specific goods. But the moment that all is done to the goods that is required, and they are appropriated to the purchaser, the property passes. *Fragano v. Long* ⁽⁹⁾; *Atkinson v. Bell* ⁽¹⁰⁾; *Boves v. Pontifex* ⁽¹¹⁾; *Hunt v. Silk* ⁽²⁾; *Beed v. [442 Blandford* ⁽¹²⁾; *Blackburn v. Smith* ⁽¹³⁾; *Benjamin on Sale*, 104 et seq.; *Morton v. Tibbett* ⁽¹⁴⁾; *Cusack v. Benjamin* ⁽¹⁵⁾. If the property has once passed the purchaser cannot return the goods. *Street v. Blay* ⁽¹⁶⁾ compendiously states the law applicable to this case. When under an executory contract of sale the intermediate goods have been appropriated to the contract, and that appropriation has been assented to, the result is the same as if the contract had originally been for specific goods.

[BRETT, J. The question is, whether there has been a sufficient assent to the appropriation here.]

With respect to the goods forwarded to Lille, the plaintiffs have exercised dominion over them and impressed a new destination upon them: *Chapman v. Morton* ⁽¹⁷⁾; *Harnor v. Groves* ⁽¹⁸⁾; *Parker v. Wallis* ⁽¹⁹⁾. All the goods delivered were inspected and approved in accordance with the terms of the contract, and the price was paid. The plaintiffs had their attention fully di-

⁽¹⁾ 8 M. & W., 871.

⁽²⁾ 5 East., 449.

⁽³⁾ E. B. & E., 148; 27 L. J. (Q. B.), 232.

⁽⁴⁾ 2 Ex., 790; 18 L. J. (Ex.), 187.

⁽⁵⁾ 10 Ex., 191; 23 L. J. (Ex.), 314.

⁽⁶⁾ 18 Q. B., 560.

⁽⁷⁾ Law Rep., 7 Ex., 7.

⁽⁸⁾ 20 L. T. (N.S.), 705; 17 W. R., 768.

⁽⁹⁾ 4 B. & C., 219.

⁽¹⁰⁾ 8 B. & C., 277.

⁽¹¹⁾ 3 F. & F., 739.

⁽¹²⁾ 2 Y. & J., 278.

⁽¹³⁾ 2 Ex., 788.

⁽¹⁴⁾ 15 Q. B., 428; 19 L. J. (Q. B.), 383.

⁽¹⁵⁾ 1 B. & S., 299; 30 L. J. (Q. B.), 261.

⁽¹⁶⁾ 2 B. & Ad., 456.

⁽¹⁷⁾ 11 M. & W., 534.

⁽¹⁸⁾ 15 C. B., 667; 24 L. J. (C.P.), 53.

⁽¹⁹⁾ 5 E. & B., 21.

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rected to the question whether the shoes contained paper, and it is contended that they might have opened a sufficient number of the shoes to satisfy themselves on this point. If they choose to accept without satisfying themselves on this point, they cannot afterwards reject the shoes. It is contended that if there be a right to reject, the purchaser cannot reject without returning the goods. Could the purchaser export the goods to China, and on its being discovered there that they were not according to contract, throw them on the vendor's hand there? The purchaser has no right to reject the goods unless he can place the vendor in statu quo. If he can reject without returning the goods, he must at least reject at the place where the vendor was bound to deliver. The letter of the 11th of February does not alter the case; it did not entitle the plaintiffs to throw the shoes on the hands of the defendants without returning them. On these grounds the damages ought not to include the price of the 443] shoes, but only such damages *as properly arise from the breach of warranty: *Loder v. Kekule*.⁽¹⁾ It is also contended that the loss of profit, whether on the shoes already delivered or those undelivered, cannot be recovered. The shoes delivered were equal to sample, for the sample shoe did contain paper; therefore the French authorities would have rejected the shoes even if equal to sample, so the loss of profit did not arise from the goods not being equal to sample; the damages ought to be the difference in value only between the shoes that were and those which ought to have been delivered.

[BRETT, J. But the defect was a latent defect, which could not be discovered by any reasonable examination or by comparison with the sample, and the goods were not of the description contracted for viz., army shoes.]

With respect to the loss of profit on the shoes undelivered, the contract is divisible; the fact that those delivered were not according to contract did not entitle the plaintiffs to refuse to receive the remainder. *Cur. adv. vult.*

July 5. BOVILL, C.J. This case was argued before my brothers Byles and Brett and myself. My brother Byles concurs in the judgment I am about to deliver; and I will presently read the judgment of my brother Brett.

This action was brought for the breach of contract by the defendants to supply a large quantity of shoes for the French army; and the questions which were raised related almost entirely to the damages which the plaintiffs were entitled to recover, but also involved some important points with respect to the vesting of property in goods under an executory contract of sale, and

(1) 8 C. P. (N.S.), 123; 27 L. J. (C. P.), 27.

as to the right of the purchasers to reject the goods after having received and paid for them.

The original contract was entered into between the plaintiffs and the defendants on the 30th of December, 1870, and was for 30,000 black army shoes, as per sample, at 4s. 8d. per pair, less $2\frac{1}{2}$ per cent. discount, to be delivered free at a wharf in weekly quantities; to be inspected and quality approved before shipment; and payment to be made in cash at the time of each delivery. The *times for the delivery of the shoes were [444 afterwards altered, by consent.

The plaintiffs, who were merchants in London, in entering into this contract, were acting under instructions from and on behalf of a M. Potel and a Mr. Ireland, of Lille.

The defendants were shoe manufacturers in London and at Northampton; and at the time the contract was entered into it was known to all parties that the shoes were required for the French army, and for a winter campaign. A sample shoe was deposited, and which was also submitted to the French authorities, with whom M. Potel had made a contract for supplying the shoes.

The plaintiffs appointed a person in the trade (Mr. Roberts) to inspect the shoes on their behalf; and several hundred pairs were rejected: but a large number were inspected and approved by him. The invoices were then made out and signed by the plaintiff's agent, Mr. Harry, and the shoes were thereupon sent to Fenning's wharf, London, which had been named by the plaintiffs as the place for delivery. On the inspection of the shoes, the soles were not opened, and it is not usual to open them, but without doing so it could not be ascertained of what the fillings of the soles consisted, or whether there was paper in them or not.

The first delivery at Fenning's wharf took place on the 30th of January, 1871, and on that day, and before this parcel was delivered, a statement had appeared in some of the newspapers that a contractor had been imprisoned in France for putting paper into the soles of the shoes. Some communication took place with one of the defendants upon the subject; and the evidence was contradictory as to whether the defendant had or had not said that there was no paper in the shoes, as far as he was aware; but it was proved that, on the 2d or 3rd of February, Mr. Harry, acting for the plaintiffs, and before the shoes were shipped, requested that a shoe might be cut open, to see if there was any paper in the sole, that the defendants' foreman (Webb) assented to this being done, and stated that the plaintiffs might cut open as many as they pleased, and would not find any paper in them. The sole of a shoe was accordingly cut open, and no

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paper was found in it. The plaintiff's evidence also went to 445] show that many assurances were *given on the part of the defendants that there was no paper in the soles of the shoes.

The plaintiffs then paid the defendants for the shoes which had been delivered by them at Fenning's Wharf, being twenty-two cases, containing about 4950 pairs, and shipped them for Dunkirk, to be thence forwarded by railway to Lille, where they were to be delivered to the French authorities. This parcel arrived at Lille on the 10th of February.

In the meantime the plaintiffs had forwarded one pair of the shoes to Mr. Ireland at Lille; and this pair, having been opened by him, was found to contain pieces of paste-board box in the soles. A communication was made on the 9th of February to one of the defendants, who stated that it must be a mistake; and several more pairs of shoes were then opened and found not to contain paper. The sole of the sample shoe was at the same time opened, and it was found that this shoe did contain paper. The plaintiffs then stopped the further delivery of shoes by the defendants. Mr. Harry took several of the pairs which had been opened and found not to contain paper, and the sample shoe which did contain it, to Lille, and, after communicating with Mr. Ireland, he telegraphed to the plaintiffs on the 10th of February, "Pay for and ship all Hickson's goods ready at wharf and warehouse."

At that time some more shoes had been inspected, approved, and delivered at Fenning's Wharf on the 7th or 8th of February, and the defendants had asked for a check for them, which had been refused; but, upon receipt of the telegram from Mr. Ireland, the plaintiffs paid for those shoes which had been so delivered. At this time it was well known to the defendants that the shoes were required to be sent to Lille for the French army, and had to be passed by the French authorities, and that the sample shoe and the shoe sent to Mr. Ireland had been found to contain paper in the soles; and after some discussion upon the subject, and as to the terms of the following letter, the defendants agreed to and eventually on the 13th of February signed the letter which bears date the 11th of February.

By that letter, which is addressed to the plaintiffs, the defendants agreed to take back those shoes which might be thrown back on their (the plaintiffs') hands in consequence of paper 446] being found *in them; it being understood that they could not take back any large number of shoes if paper should be found in only a few pairs; and they stated their willingness that the closest inspection should be made.

Upon this letter being signed and given to the plaintiffs, the inspection and delivery of the shoes were continued, several

parcels were delivered at the wharf after having been inspected by Mr. Roberts and passed by Mr. Harry for the plaintiffs, and the plaintiffs paid for them, and forwarded them by sea and railway to Lille. The total quantity thus forwarded to France was 12,225 pairs. The cost of the transit and the duty in France were paid by Mr. Ireland. There were more shoes delivered at Fenning's Wharf, which were afterwards sold under an arrangement between the parties.

On the 26th of February, information reached this country that some of the shoes had been found to contain paper; and, on the 28th of February, upon the entire quantity which had been shipped being tendered to the French government, some were opened and found to contain paper, and the whole were rejected by the French authorities. The shoes were then sent by the French military intendant to a public bonded warehouse at Lille, where they were deposited, and still remain.

The defendants were informed of the rejection of the shoes; and one of them at once proceeded to Lille, and, with the other parties concerned, endeavored to get the shoes passed by the French authorities. In this, however, they were not successful, and the French government refused to take any of the shoes.

One of the defendants, on being asked the question, would not guaranty that there were not 5000 pairs with paper in them, though he stated that he would guaranty that there were not 7000 pairs that had paper in the soles.

A considerable number of the shoes were opened at Lille, and many of them (in one instance seventeen pairs out of eighteen that were opened) were found to contain paper; and Mr. Ireland therefore told one of the plaintiffs, who was present when this was discovered, that, in consequence of the defendants' letter of guaranty of the 11th of February, he should take no further steps in the matter, and that he threw the goods on the defendants' hands.

*The defendants were required to return the money [447 for the shoes, and were told that the plaintiffs would hold them to the letter of guaranty. One of the defendants in answer stated that, before he would take back any of the shoes, the plaintiff must show him what shoes did contain paper; and, upon the plaintiffs stating that this was absurd, and that they should have to destroy all the shoes to find it out, the defendant said that he could do no more, that the plaintiffs must cut open what they liked, and any which contained paper the defendants would take back.

From examinations of a number of the shoes, made subsequently and after this action was commenced, it appeared that a large proportion, and considerably more than half of over 100

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pairs which were examined from different cases, did contain paper, canvas shavings, or asphalte roofing-felt, and nearly one-half of the whole of them contained paper in the soles; of fourteen other pairs, only three contained leather fillings in the soles; and, of fifty other pairs, nearly the whole contained paper. The objection to paper was stated to be that, when it becomes wet, from the pressure of the foot it dries up in lumps; and one of the defendants admitted at the trial that shoes with paper in the soles were objectionable for a soldier, and were not fitted for a winter campaign.

There was also evidence on the part of the plaintiffs to show that, even independently of the paper, the shoes were not equal to the sample. The defendants called a number of witnesses to show that the whole of the shoes, including about 17,000 pairs which were ready to be delivered, were equal to the sample; but none of those witnesses had opened the soles of any of the shoes.

Upon the matters left to the jury they found that the shoes delivered, and also those that were ready for delivery, were not equal to the sample, and that the defects could not have been discovered by any inspection which ought reasonably to have been made by Roberts or Harry.

It had also been contended by the defendants that the letter of the 11th of February was not intended to be a binding agreement, but only to be shown to the French authorities; but the jury found that the letter was intended to be an undertaking by the defendants, in order to settle a *bonâ fide* dispute.

448] *The damages, under the direction of my brother Brett, who tried the cause, were assessed as follows:

	£	s.	d.
To amount paid for 12,825 pairs of shoes delivered at Fening's Wharf, of which 12,225 pairs were sent to Lille, at 4s. 8d., less 2½ per cent.	2917	13	9
To cost of 57 packing cases for the above shoes sent to Lille	26	7	3
Charges, freight, and insurance on same	46	15	6
Duty, carriage, and expenses, Dunkirk to Lille	280	12	6
	<hr/>		
Cartage and warehouse dues to railway	Fr. c.	£3271	9 0
Cartage to the military warehouse	586	0	
Warehouse expenses at Lille	123	60	
	1915	70	
	<hr/>		
To loss of profit on above mentioned 12,825 pairs. They would have valued at 7 fr. 25 c.	£3719	5	0
Costs, as above	3271	9	0
	<hr/>		
The like proportion of profit in respect of 17,175 pairs remaining to be delivered	447	16	0
	<hr/>		
	495	0	0
	<hr/>		
	£4214	5	0
	<hr/>		

The verdict was entered for the plaintiffs for the whole of these sums; leave being reserved to the defendants to move to reduce the damages by any sum that the Court might think right.

A rule nisi was accordingly granted; and the main practical question upon the argument of the rule was as to which party was to bear the risk and loss upon the shoes remaining at the warehouse at Lille, since they were rejected by the plaintiffs.

The defendants contended that the plaintiffs had accepted the goods, and were not at liberty afterwards to reject them; that the shoes consequently remained the plaintiffs' property and at their risk; and that the plaintiffs could only recover damages as for the breach of warranty. The plaintiffs, on the other hand, contended that they were entitled to reject the goods and to throw them on the defendants' hands at Lille, and that they were entitled to recover back the whole price that they had paid for them, as well as damages for the breach of contract, — leaving the shoes the property of the defendants and at their risk.

*A number of authorities were cited in the course of [449] the argument as bearing upon these questions; but the principles of law which are applicable to such cases are now tolerably well settled.

Where specific and ascertained existing goods or chattels are the subject of a contract of immediate and present sale, and whether there be a warranty of quality or not, the property generally passes to the purchaser upon the completion of the bargain, and the vendor thereupon has a right to recover the price, unless from other circumstances it can be collected that the intention was that the property should not at once vest in the purchaser. Such an intention is generally shown by the fact of some further act being first required to be done; such as, for instance, in most cases, delivery — in some cases, actual payment of the price — and in other cases, weighing or measuring in order to ascertain the price, or marking, packing, cooperating, filling up casks, or the like.

Where there is a warranty of the quality of such specific goods, that circumstance will not prevent the property in them passing to the purchaser; and, if it be simply a warranty, will not entitle the purchaser to refuse to accept the goods, or to return them, merely because the warranty is not fulfilled; and in order to entitle the purchaser so to refuse or to return them, it must, in the case of specific goods, be a term of the contract that he shall be at liberty to do so.

In the case of executory contracts, where the goods are not ascertained or may not exist at the time of the contract, from the nature of the transaction no property in the goods can pass

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to the purchaser by virtue of the contract itself; but, where certain goods have been selected and appropriated by the seller and have been approved and assented to by the buyer, then the case stands, as to the vesting of the property, very much in the same position as upon a contract for the sale of goods which are ascertained at the time of the bargain. In most cases of such executory contracts, something more would generally remain to be done, such as, for instance, selection or appropriation, approval, and delivery of some kind, before the property would be considered as intended to pass and upon that taking place the property might pass if it was intended to do so, equally as in the case of a contract for specific 450] *and ascertained goods. Lord Wensleydale, in the case of *Dixon v. Yates* ⁽¹⁾, put the case of the sale of a specific chattel upon the same footing as the sale of an unascertained chattel after delivery, for the purpose of showing that the property vested in the latter case upon delivery, and in the former by the contract itself: and see also upon this subject *Alexander v. Gardner* ⁽²⁾; *Attridge v. Johnson* ⁽³⁾, which was confirmed by *Langton v. Higgins* ⁽⁴⁾; also the judgment of Parke, B., in *Wait v. Baker* ⁽⁵⁾; *Brown v. Hare* ⁽⁶⁾, in error; and *Tregelles v. Sewell* ⁽⁷⁾.

In cases where, under an executory contract, goods are sent by the vendor which do not come within the general description of those contracted for, the purchaser may refuse to receive or may reject them; and equally so if there be any other condition in the contract which is not complied with; so, in like manner, if a fraud has been practiced by the seller, then, upon discovery of the fraud, and within a reasonable time, and if nothing has been done by the purchaser to alter the position of the vendor, the purchaser may reject the goods.

In the judgment of the Court of Exchequer Chamber delivered by my Brother Williams in the case of *Behn v. Burness* ⁽⁸⁾, the law is thus laid down: "In cases where the thing sold is not specific, and the property has not passed by the sale, the vendee may refuse to receive the thing proffered to him in performance of the contract, on the ground that it does not correspond with the descriptive statement, or, in other words, that the condition expressed in the contract has not been performed: still, if he receive the thing sold, and has the enjoyment of it, he cannot afterwards treat the descriptive statement as a condition, but only as an agreement, for a breach of which he may bring an action to recover damages." And in the last edition (1871) of

(1) 5 B. & Ad. at p. 340.

(2) 4 H. & N., 832; 29 L. J. (Ex.), 6.

(3) 1 Bing. N. C., 671.

(4) 7 H. & N., 574.

(5) 7 E. & B., 885; 26 L. J. (Q.B.), 293.

(6) 3 B. & S. at p. 756; 32 L. J. (Q.B.),

(7) 4 H. & N., 402; 28 L. J. (Ex.), 252. 204.

(8) 2 Ex., 1.

the notes to Williams' Saunders, vol. i. p. 554, the result of several of the cases is thus stated by the learned editor: "When it appears that the consideration has *been executed in [451] part, that which was before a warranty or condition precedent, loses the character of a condition, or, to speak more properly, ceases to be available as a condition, and becomes a warranty in the narrower sense of the word, viz., a stipulation by way of agreement, for the breach of which a compensation must be sought in damages."

Although the property in the goods, whether under an immediate or an executory contract of sale, may have passed, there may still in each instance be a lien for the purchase money, and a right to stop in transitu, and the purchaser may not be entitled to possession without payment of the price.

In cases of executory contracts, where there is a warranty of quality, the purchaser is not only not bound to receive the goods unless they correspond with the warranty, but, even after they have been delivered by the vendor, may reject them on discovering the defect. It is however, generally necessary, in order to enable the purchaser to recover back the price which he may have paid for the goods, that he should not have done more than was necessary for a fair trial of them, or for the purpose of examination and comparison, and also that he should reject the goods within a reasonable time, and that he should not have done any act to alter the position of the vendor, nor as was said by Parke, J., in *Street v. Blay* ⁽¹⁾, to delay the return of the goods. If the purchaser has exercised acts of dominion over the goods, as by parting with the property in them, or has prevented the vendor being placed in the same situation, then, generally speaking, he will not be entitled to return or reject them: *Street v. Blay* ⁽²⁾; and see also *Hunt v. Silk* ⁽³⁾, *Clarke v. Dickson* ⁽⁴⁾, especially the observations of Crompton, J., and the conclusion of the judgment in *Blackburn v. Smith* ⁽⁵⁾.

In some cases, however, such as where the goods are utterly valueless, the dealing with them by the purchaser has been held not to affect his right to reject and to refuse to pay anything for them; as in *Poultton v. Lattimore* ⁽⁶⁾, where the purchaser had sown some and sold other part of certain clover seed which had *been warranted as new growing seed, but the whole of [452] which turned out to be totally unproductive and useless.

In determining what is a reasonable time for rejecting goods, the conduct of the seller may be taken into consideration; as where by a subsequent misrepresentation he has induced the

(1) 2 B. & Ad., at p. 458.

(2) 2 B. & Ad., 457.

(3) 5 East, 452.

(4) E. B. & E., 148.

(5) 2 Ex., 792.

(6) 9 B. & C., 259.

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to the purchaser by virtue of the contract itself; but, where certain goods have been selected and appropriated by the seller and have been approved and assented to by the buyer, then the case stands, as to the vesting of the property, very much in the same position as upon a contract for the sale of goods which are ascertained at the time of the bargain. In most cases of such executory contracts, something more would generally remain to be done, such as, for instance, selection or appropriation, approval, and delivery of some kind, before the property would be considered as intended to pass and upon that taking place the property might pass if it was intended to do so, equally as in the case of a contract for specific 450] *and ascertained goods. Lord Wensleydale, in the case of *Dixon v. Yates* ⁽¹⁾, put the case of the sale of a specific chattel upon the same footing as the sale of an unascertained chattel after delivery, for the purpose of showing that the property vested in the latter case upon delivery, and in the former by the contract itself: and see also upon this subject *Alexander v. Gardner* ⁽²⁾; *Attridge v. Johnson* ⁽³⁾, which was confirmed by *Langton v. Higgins* ⁽⁴⁾; also the judgment of Parke, B., in *Wait v. Baker* ⁽⁵⁾; *Brown v. Hare* ⁽⁶⁾, in error; and *Tregelles v. Sewell* ⁽⁷⁾.

In cases where, under an executory contract, goods are sent by the vendor which do not come within the general description of those contracted for, the purchaser may refuse to receive or may reject them; and equally so if there be any other condition in the contract which is not complied with; so, in like manner, if a fraud has been practiced by the seller, then, upon discovery of the fraud, and within a reasonable time, and if nothing has been done by the purchaser to alter the position of the vendor, the purchaser may reject the goods.

In the judgment of the Court of Exchequer Chamber delivered by my Brother Williams in the case of *Behn v. Burness* ⁽⁸⁾, the law is thus laid down: "In cases where the thing sold is not specific, and the property has not passed by the sale, the vendee may refuse to receive the thing proffered to him in performance of the contract, on the ground that it does not correspond with the descriptive statement, or, in other words, that the condition expressed in the contract has not been performed: still, if he receive the thing sold, and has the enjoyment of it, he cannot afterwards treat the descriptive statement as a condition, but only as an agreement, for a breach of which he may bring an action to recover damages." And in the last edition (1871) of

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(2) 4 H. & N., 822; 29 L. J. (Ex.), 6.

(3) 1 Bing. N. C., 671.

(4) 7 H. & N., 574.

(5) 7 E. & B., 885; 26 L. J. (Q.B.), 293.

(6) 3 B. & S. at p. 756; 32 L. J. (Q.B.),

(7) 4 H. & N., 402; 28 L.J. (Ex.), 252. 204.

(8) 2 Ex., 1.

the notes to Williams' Saunders, vol. i. p. 554, the result of several of the cases is thus stated by the learned editor: "When it appears that the consideration has *been executed in [451] part, that which was before a warranty or condition precedent, loses the character of a condition, or, to speak more properly, ceases to be available as a condition, and becomes a warranty in the narrower sense of the word, viz., a stipulation by way of agreement, for the breach of which a compensation must be sought in damages."

Although the property in the goods, whether under an immediate or an executory contract of sale, may have passed, there may still in each instance be a lien for the purchase money, and a right to stop in transitu, and the purchaser may not be entitled to possession without payment of the price.

In cases of executory contracts, where there is a warranty of quality, the purchaser is not only not bound to receive the goods unless they correspond with the warranty, but, even after they have been delivered by the vendor, may reject them on discovering the defect. It is however, generally necessary, in order to enable the purchaser to recover back the price which he may have paid for the goods, that he should not have done more than was necessary for a fair trial of them, or for the purpose of examination and comparison, and also that he should reject the goods within a reasonable time, and that he should not have done any act to alter the position of the vendor, nor as was said by Parke, J., in *Street v. Blay* ⁽¹⁾, to delay the return of the goods. If the purchaser has exercised acts of dominion over the goods, as by parting with the property in them, or has prevented the vendor being placed in the same situation, then, generally speaking, he will not be entitled to return or reject them: *Street v. Blay* ⁽²⁾; and see also *Hunt v. Silk* ⁽³⁾, *Clarke v. Dickson* ⁽⁴⁾, especially the observations of Crompton, J., and the conclusion of the judgment in *Blackburn v. Smith* ⁽⁵⁾.

In some cases, however, such as where the goods are utterly valueless, the dealing with them by the purchaser has been held not to affect his right to reject and to refuse to pay anything for them; as in *Poulton v. Lattimore* ⁽⁶⁾, where the purchaser had sown some and sold other part of certain clover seed which had *been warranted as new growing seed, but the whole of [452] which turned out to be totally unproductive and useless.

In determining what is a reasonable time for rejecting goods, the conduct of the seller may be taken into consideration; as where by a subsequent misrepresentation he has induced the

⁽¹⁾ 2 B. & Ad., at p. 458.

⁽²⁾ 2 B. & Ad., 457.

⁽³⁾ 5 East, 452.

⁽⁴⁾ E. B. & E., 148.

⁽⁵⁾ 2 Ex., 792.

⁽⁶⁾ 9 B. & C., 259.

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(⁵) 2 Ex., 792.

(⁶) 9 B. & C., 259.

purchaser to prolong the trial: *Adam v. Richards* ⁽¹⁾. And, where a purchaser is entitled to reject goods, and gives notice to the vendor that he has done so, the latter is bound to take them away; and, if he omits to do so, they remain at his risk, as was laid down by Bayley, J., in *Okell v. Smith* ⁽²⁾.

Upon the argument it was agreed that the Court should deal with the question of damages independently of the particular form of the pleadings in the action.

If the case had rested on the original contract, we should have thought, as to the 12,225 pairs of shoes sent to France, that by the appropriation of these shoes by the defendants for the plaintiffs, the inspection and examination of them by the plaintiffs' agents, their being passed by those agents, the making out of invoices of the shoes so passed, debiting the plaintiffs for them as bought by the plaintiffs for the defendants, the delivery of them at the wharf, and the defendants having no further control over them, the plaintiffs paying the defendants the amount of the invoices and subsequently sending the goods as their own to France and causing the freight and duty to be paid on them, and tendering them to the French authorities under the contract of M. Potel,—they must be taken to have accepted those shoes, that the property in them vested in the plaintiffs, and that they were not at liberty to reject the shoes and throw them back upon the defendants' hands; see, in addition to the cases cited, and those above referred to, *Rhodes v. Thwaites* ⁽³⁾ and *Parker v. Palmer* ⁽⁴⁾. The same rule would also in our opinion have applied to the small quantity of shoes which were approved, passed, and delivered, and paid for, and received at Fenning's Wharf.

In this view of the case, the shoes delivered would have remained the property of the plaintiffs and at their risk, though they would still have been entitled to claim damages by reason 453] of the breach of warranty, and not be precluded by their acceptance of the goods, or the vesting of the property in them, from maintaining this action. The damages, however, in that case would not have included the whole price paid for the shoes, but only the difference between the value of those which were delivered and what would have been their value if they had been supplied according to the contract, with such other amounts as the plaintiffs could legally establish.

The plaintiffs were not content with this view of the case, but desired to throw the shoes altogether upon the defendants, and contended that they were entitled to recover back the whole price which they paid for the shoes, as well as the expenses to which they had been put, and the loss of profits from their

⁽¹⁾ 2 H. Bl., 573.

⁽²⁾ 1 Stark., 109.

⁽³⁾ 6 B. & C., 388.

⁽⁴⁾ 4 B. & A., 387.

being prevented carrying out the contract with the French government; and the question is, what damages the plaintiffs are now entitled to recover.

The contract was expressly made for army shoes. At the time it was entered into, both parties were aware that the shoes were wanted for the French army, and for a winter campaign; and by the 13th of February, the defendants were aware that the shoes were to be forwarded to Lille in fulfilment of a contract with the French authorities, and that the shoes would be rejected and the contractors probably imprisoned if the shoes which were tendered should be found to contain paper fillings in the soles. The letter which is dated the 11th of February, and was signed on the 13th, must be construed with reference to the state of things existing and of which the defendants were aware at that time. The defects in the soles of the shoes were such as could not be discovered by any ordinary inspection or examination, or, indeed, without cutting open the soles; and the defendants, as the manufacturers, would be responsible for the improper acts of the workmen employed by them to manufacture the shoes, in putting improper fillings into the soles. It must also, we think, be considered that they had by their statement and conduct induced the plaintiffs to believe that there was little or no paper in any quantity of shoes, and with a knowledge on their part that, if the soles of the shoes were found to contain paper, they would in all probability be rejected by the French authorities.

*Upon the finding of the jury as to the letter of the 11th [454 of February, it must, we think, be treated as a new additional contract between the parties, adding fresh terms to the original contract with reference to the difficulties that had arisen and were likely to arise with the French authorities at Lille; and upon the proper construction of the whole contract, including the letter of the 11th of February, we are of opinion that the plaintiffs were entitled to throw back the shoes upon the defendants' hands at Lille, upon their being rejected by the French authorities, if a large quantity of them did in fact contain paper in the soles. We think it was not necessary that every shoe should be cut open, and that the examination which has been made of a large number of them before and since the action was commenced was sufficient to show that a large proportion of them did contain paper; and we think, therefore, that the plaintiffs were entitled to throw back the whole of those which had been forwarded to France upon the defendants' hands at Lille; that the defendants were bound to take them back at that place; and that, as the shoes were rejected by the plaintiffs, and due notice given to the defendants, the shoes remained at

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the risk of the defendants, and were their property, and that they are liable to repay to the plaintiffs the whole of the price paid for those shoes.

We are of the same opinion with respect to the shoes delivered at Fenning's wharf, and paid for by the plaintiffs but not forwarded to Lille, and which were sold by arrangement, as before mentioned.

It was contended for the defendants that, as the sample shoe contained paper, and the French government would have rejected the shoes if they had been precisely in accordance with the sample in that respect, the damages, and especially the loss of profit, did not result from the breach of warranty, in the shoes not being equal to sample. But the fact of the improper paper fillings in the sole of the sample shoe was a hidden defect, and appears to have been unknown to all parties. It could not be seen or discovered by any ordinary examination of the shoes; and the letter of the 11th of February was expressly directed to the point of paper being in the shoes, and in our opinion gave the right to reject the shoes on that ground, and entitles the 455] plaintiff to recover the loss of profit which *would have accrued if the shoes had been accepted by the French authorities.

No question was raised, and very properly, as to the rights of the plaintiffs to recover as damages the charges and expenses incurred in sending the goods to Lille and the expenses upon them there; and the only remaining question as to the damages was, whether the plaintiffs were entitled to recover as damages the loss of profit on the 17,175 pairs of shoes which were ready for delivery though not delivered to the plaintiffs. It seems to us, upon the finding of the jury, that these shoes also were not according to contract; and as the whole formed part of one contract, there is no valid distinction in this respect between these shoes and those which were in fact delivered, and that the plaintiffs are entitled to recover the loss of profit upon the whole quantity.

With reference to this last point a further question was raised as a ground for a new trial, that the verdict was against the weight of the evidence as to these 17,175 pairs of shoes; but we think there was abundant evidence to warrant the finding of the jury. The defendants' evidence was most unsatisfactory. My Brother Brett, who tried the cause, reports to us that he is not dissatisfied with the verdict; and we see no sufficient grounds for setting it aside or interfering with it upon this point.

Upon the whole, we are of opinion that the plaintiffs are entitled to maintain the verdict for the whole amount of damages for which it was entered, that the shoes are the property of the

defendants, and remain at their risk, and that the rule to reduce the damages, or for a new trial, must be discharged.

BRETT, J. ⁽¹⁾ I agree with the Lord Chief Justice in the conclusion at which he has arrived. I agree also with the construction given by my Lord to the agreement of the 11th of February, and its effect upon the original contract and on the plaintiffs' rights. But I am, with much deference, unable to agree with the view expressed by my Lord of the plaintiffs' rights as affected by the original contract if it stood alone and in the events which have happened, I think that, under the original contract and on the events which ensued, the plaintiffs would have had the right to throw the shoes upon the defendants' hands at Lille.

*Besides the incidents attaching to a contract of sale by [456 sample, and which have been enumerated by my Lord, I think there is also the following, that such a contract always contains an implied term that the goods may under certain circumstances be returned; that such term necessarily contains certain varying or alternative applications, and, amongst others, the following, that, if the time of inspection, as agreed upon, be subsequent to the time agreed for the delivery of the goods, or if the place of inspection, as agreed upon, be different from the place of delivery, the purchaser may, upon inspection at such time and place, if the goods be not equal to sample, return them *then and there* on the hands of the seller. Otherwise the right of inspection given to the purchaser would fail in its primary object.

The time of inspection agreed upon in this contract was before delivery, and the place was London. If by any reasonable care, or exercise of reasonable forethought, the plaintiffs could have had before delivery and in London an inspection which would by reasonable care or skill have been effective, I should have thought that they could not have rejected the goods at Lille; if the defect had been such as neither the defendants nor any one for whose fault or negligence they were answerable in law could by reasonable care or skill have discovered, I should have still been inclined, though with more doubt, to say that the plaintiffs could have rejected the goods at Lille. But here the defendants knew from the beginning that the subject matter of their contract was an article contracted for in order to fulfil a contract for a delivery of shoes by sample at Lille; so that, if they prevented an effective inspection in London, there could be no other inspection before the arrival of the goods at Lille; and the defect in the shoes, which made the same breach of the same term as to quality in both contracts, was the consequence of acts of their servants, they (the defendants) being the manufacturers of the goods; and the defect, though known to the

(¹) Read by Bovill, C.J.

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defendants' servants, was a secret defect, not discoverable by any reasonable exercise of care or skill on an inspection in London. By the necessary inefficacy of the inspection in London, an inefficacy caused by this kind of fault, viz. a secret defect of manufacture which the defendants' servants, committed, the apparent inspection in London could be of no more practical 457] *effect than no inspection at all. If it could be of no practical effect, there could not, as has been observed, be any effective, and, therefore, any real practical inspection until an inspection at Lille.

No real use was made or could be made of the goods before their acceptance by the French government at Lille. The apparent inspection in London, then, being by the acts of the defendants' servants no inspection at all, and consequently a real inspection at Lille being by the acts of the defendants' servants the first possibly effective inspection, and no use of the goods having been made before the inspection at Lille, it seems to me that such inspection was, by the acts of persons for whose acts the defendants were responsible, substituted for the first inspection stipulated for by the contract, and that the rights of the plaintiffs accrued upon that inspection as if it was the first, and therefore they were entitled to throw the shoes upon the hands of the defendants at Lille, under the implied term in the contract that, if the goods should be found not equal to sample on inspection, the plaintiffs might return them upon the defendants' hands at the time and place of inspection, although the time of inspection was by the wrongful acts of the defendants' servants become a time subsequent to the time of delivery, and the place of inspection was become different from the place of delivery.

BOVILL, C.J. My brother Brett, therefore, has come to the same conclusion as to the result; and by the unanimous judgment of the Court the rule must be discharged. *Rule discharged.*

Attorneys for plaintiffs: *Thomas & Hollams.*

Attorneys for defendants: *Venning, Robins, & Venning.*

July 5, 1872.

458] *WINCH v. THE CONSERVATORS OF THE THAMES.

[Law Reports, 7 Common Pleas, 458.]

Negligence—Corporation—Public Purposes—Liability to repair Towing path.

The defendants were a corporate body in whom were vested, by the Thames Navigation Act, 1866 (29 & 30 Vict. c. 89), certain powers and authorities for the preservation and improvement of the stream, bed and banks of the upper part of the Thames, including all powers and authorities before that act vested in the commissioners appointed for the purposes of the upper navigation of the Thames

under earlier statutes. From these statutes it appeared that there were originally owners and occupiers of towing paths on the river banks who took toll for horses passing along them, and that such persons were bound to keep the towing path in repair; and that by the statutes the commissioners had extensive powers of supervision and control over the towing paths, and power to make orders respecting them and to regulate the toll to be taken by persons entitled to take it. They subsequently acquired by the statutes power to purchase and take lands compulsorily, and to execute works for the purposes of the navigation; and by the act of 28 Geo. 3, c. 51, s. 6, were authorized themselves to take toll, for, amongst other things, the towing paths purchased or hired by them. By the 35th Geo. 3, c. 106, ss. 18, 23, they obtained power to execute any works or repairs that they thought needful or proper, and to pay for them out of the rates and tolls, and also to make and establish a continued horse towing path throughout the navigation, and to purchase land for that purpose. By the Thames Navigation act, 1866, the defendants were authorized to take tolls and apply their funds to the expenses of the repair, &c., of the works vested in, acquired by, or constructed by them under the act, and to carrying into execution the purposes of that act and of the former acts.

In consequence of a part of the bank on the upper navigation of the Thames being out of repair and giving way, some horses of the plaintiff, which were engaged in towing a barge, fell into the river and were drowned. The defendants had, in pursuance of the powers vested in them in 1866, made a parol agreement with the owner of the soil of the towing path, at the place in question, for the use of such towing path at an annual rent, and having likewise acquired the use of the whole of the rest of the towing paths along the river, they were in the habit of taking an aggregate toll for the use of the whole of the navigation and towing path at Teddington Lock, which they had done in the present instance. The plaintiff having brought an action against the defendants for negligence in not keeping the towing path in repair:

Held, that the defendants had power under their statutes to maintain and repair the towing path, for the use of which they were entitled to take a toll; that according to the decision in *Mersey Docks v. Gibbs* (Law Rep., 1 H. L., 93), the intention of the legislature in such cases is that the corporation shall have the same duties, and its funds shall be subject to the same liabilities, as the general law would impose upon a private person having and exercising the same rights; and consequently that, the defendants having provided the towing path under their acts, having power under such acts to maintain and repair it, and having invited the public to use it and taken toll for the use of it, were bound to take reasonable care that it was in a fit condition to be used as a towing path; and that [459 the action was maintainable.

The towing path includes so much of the bank as is necessary and proper for the purpose of towing barges, and is reasonably and properly used as such.

THIS was an action against the defendants for negligence in the management and control of a portion of the banks and towing paths of the river Thames, and in not maintaining them in a reasonable, safe, and proper condition for the purpose of towing barges, whereby certain horses of the plaintiff, employed in towing a barge upon the towing path, for the use of which towing path a toll had been paid to the defendants, fell into the river and were drowned (').

The trial took place before Cockburn, C.J., at the Surrey Spring Assizes, when a verdict was entered for the plaintiff for

(') It is unnecessary for the purposes of this report to set out the pleadings, inasmuch as it was agreed that the question of the defendants' liability should be considered apart from the

form of the pleadings. There were demurrers to the counts for the declaration, which came on for argument with the rule, and disposed of, as will appear by the judgment.

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100l. damages, leave being reserved to the defendants to move to enter the verdict for themselves, on the ground that no obligation or liability was cast on the defendants to repair and maintain the towing path or that part of the bank which gave way. The facts as proved at the trial, and the statutes on which the question of the defendants' liability depended, are sufficiently set forth in the judgment.

A rule nisi was obtained in pursuance of the leave reserved, against which

June 4, 5, and 6. *Denman*, Q.C., and *McLeod*, showed cause. The statutes which regulate the powers and authorities of the defendants clearly impose upon them the duty of repairing the bank and towing paths. It is likewise contended that the defendants having taken toll for the use of the towing path, a liability is cast upon them at common law, independently of the statutes, to repair. The case of *Mersey Docks v. Gibbs* (*) is a distinct authority in the plaintiff's favor.

[BOVILL, C.J. The acts appear to give power to the conservators *to acquire the right to the use of the towing path for the public, and to take toll for the use of it. But it is not inconsistent with the acts that a private owner might still be entitled to take toll for a portion of the towing path. Must you not show that there was a transfer of the owners' rights on the particular portion of the towing path where the accident happened?]

It was proved that by arrangement with the owner he allowed the use of that part of the towing path to the defendants at a certain annual rent, and the defendants in fact took one aggregate toll at Teddington for the use of the whole towing path. It is true that this arrangement was only by parol licence, and that there was no regular demise, but it is submitted that this makes no difference with respect to the liability to repair arising from the fact of the defendants having taken toll for the use of this portion of the paths: *Nicholl v. Allen* (*). It is not necessary that the corporation should in such cases acquire the soil in the towing path: *Badger v. South Yorkshire Railway and River Dun Co.* (*). Here it must be taken that they acquired by the arrangement all things necessary for the exercise of their duties with regard to the navigation, which would include the right to repair the towing path when necessary.

[They also cited *Stracey v. Nelson* (*), and *Parnaby v. Lancaster Canal Co.* (*).]

Hawkins, Q.C., and *Joyce*, supported the rule. It was proved

(*) Law Rep., 1 H. L., 93

(*) 1 B. & S., 916, 934; 31 L. J. (Q.B.), 43, 283.

(*) 1 E. & E., 347; 28 L. J. (Q.B.), 118

(*) 12 M. & W., 535.

(*) 11 A. & E., 223.

that the plaintiff's horses were not on the usual beaten track which the horses follow in towing when the accident happened; they were close to the edge of the bank. The towing path must be taken to be the established defined track: it cannot include the whole bank.

[BRETT, J. The towing path must surely include so much of the bank as is reasonably used for the purposes of towing; it is impossible in towing barges up stream that all the horses should keep in one narrow track.]

It is submitted that the taking of tolls is no ground for making the defendants liable. There is no public right of towing on the *river banks: *Ball v. Herbert*.⁽¹⁾ The toll was [46] originally paid to the owner for the right to pass over his land. It does not follow that the owner was bound to repair the path because he took a toll. The public takes the path *tale quale*. The Acts merely give the defendants the power of buying up the tolls so that the public shall not be obliged to pay toll to each individual owner along the bank. But, admitting that there was a dedication to the public of the path as a highway for the limited purpose of towing on payment of a toll, this throws no obligation on the owner of the soil of the highway to repair. The parish must be liable to repair, if anybody is liable but it is contended that in this case possibly no one is liable for the defective state of the towing-path which arose from the action of the river in undermining the banks. It is like the case of a road passing along the edge of a cliff which is destroyed by the action of the sea. The conservators are no more liable to an action for not obviating the effect produced by the river in the course of nature on the banks, than they are for not preventing the alteration of the bed of the river by the action of the stream, as in the formation of shoals, &c. See *Rex v. Inhabitants of Paul* ⁽²⁾, *Rex v. Inhabitants of Landulph*. ⁽³⁾

It is contended that there are no provisions in the statutes which impose on the defendants the duty of repairing the towing path. If there be such a liability the proper remedy is by indictment, as in the case of non-repair of a highway, and not by action at the suit of a private individual: see *Parsons v. St. Matthew, Bethnal Green* ⁽⁴⁾; *Robbins v. Jones* ⁽⁵⁾. Moreover, the defendants had acquired only the right as against the owner of using the towing path on payment of a rent. There was no provisions that they might repair the banks. If they had repaired the banks they would have been committing a trespass against the owner.

⁽¹⁾ 3 T. R., 253.

⁽²⁾ 2 Mood. & Rob., 307.

⁽³⁾ 1 Mood. & Rob., 893.

⁽⁴⁾ Law Rep. 3 C. P., 56.

⁽⁵⁾ 15 C. B. (N.S.) 221; 33 L. J. (C.P.), 1.

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The defendants acted only as trustees for the benefit of the public in collecting the tolls. The present case is distinguishable from *Mersey Docks v. Gibbs*.⁽¹⁾ There was there merely a substitution for the private enterprise of individuals of a corporation formed for the purpose of profit and for the 462] benefit of the town *and neighborhood. The commissioners of the upper navigation of the Thames were originally in the nature of a court of justice. Their function was merely to see that exorbitant tolls were not taken, and to regulate the amount of the tolls; at that time they could not be liable to repair the banks. The subsequent statutes, for convenience sake, give them the power of buying up the tolls and levying the tolls themselves. There is nothing to show that it was ever intended to impose on them the liability to repair the banks.

Cur. adv. vult.

July 5. The judgment of the Court (Bovill, C.J., and Byles and Brett, JJ.), was delivered by

BOVILL, C.J. The defendants in this action were charged with negligence in the care, management, and control of a portion of the banks and towingpaths of the river Thames, and in not keeping and maintaining them in a reasonably safe and proper condition for the purpose of towing barges, whereby certain horses of the plaintiff employed upon the towing path in towing a barge, and for the use of which towing path toll had been paid to the defendants, fell into the river and were drowned.

The principal question of law which arose at the trial, and was reserved for the consideration of the Court, was, whether under the Acts of Parliament which regulate the upper navigation, or by force of those Acts and the application of the common law, the defendants were under any legal liability with respect to the maintenance and repairs of the towing paths or the river banks.

The defendants are a corporation constituted for the purposes of the upper navigation of the Thames by the Thames Navigation Act, 1866 (29 and 30 Vict. c. 89), having been originally incorporated for other purposes by the Thames Conservancy Act, 1857, (20 & 21 Vict. c. cxlvii.). By s. 26 of the Act of 1866, the previous Acts relating to the upper navigation were to remain in force, and to be construed as if the present body of conservators had been named therein instead of the former commissioners; and it therefore becomes necessary to examine the provisions and the language of the earlier statutes.

The first statute which appointed commissioners, 24 Geo. 2, 463] *c. 8. in the preamble refers to abuses by the *owners of the*

⁽¹⁾ Law Rep., 1 H. L., 93.

towing paths and other passages on the banks of the river. Sect. 2 gives powers to the commissioners to settle, amongst other things, the rates to be taken by the *tenants or occupiers of the towing paths, locks, &c.*, and to *regulate the towing paths, &c.*, for the benefit and safety of the navigation, making compensation to owners or occupiers of mills or land; and they were also to give such reparation, satisfaction, and damages to persons grieved, as to them should seem meet; but with an express proviso by s. 3 that they should not change the towing paths or landing places without consent of the landowners.

The 4th section provided for the mode of proceeding by the commissioners in making orders.

By s. 8 power was given to the commissioners to view the *towing paths, &c.*, to *inquire into their state and condition, and to make orders thereon*, giving notice to the persons concerned of their intended orders.

Sect. 9 imposed a penalty on persons disobeying the orders of the commissioners; and by s. 11 parties aggrieved by any such orders might within eight months appeal against them to the judges of assize, or of nisi prius in Middlesex.

The next act was 11 Geo. 3, c. 45, the title of which was "For improving and completing the navigation;" and it refers to *the abuses and exactions of the owners of several towing paths* and other passages on the banks of the river, and of the locks, &c. It also refers to an estimate which had been made of the expense of (inter alia) embanking divers parts of the river, and for purchasing lands for the making of towing paths in order to complete the navigation; and by s. 7 power is given to the commissioners to *purchase and make towing paths, &c.*, for towing with horses or otherwise, to settle the *rates to be taken for the use of the towing paths, &c.*, by the *tenants or occupiers of the same*; and they were to have regard (amongst other thing) to the *expense of repairing and supporting the towing paths, &c.*, and to make orders as to the towing paths, &c., making satisfaction to the owners of mills and lands, and giving reparation, satisfaction and damages to parties aggrieved, in the same terms as in the former act.

By s. 19 they had power to *view the towing paths, &c.*, and the **estate, condition, reparation, and circumstances thereof*, and to [464] make orders, as in the previous statute, giving notice of their intention to do so to the persons concerned; and by ss. 28, 29, and 31 the commissioners acquired compulsory powers to purchase property necessary for the purposes of the act, subject to certain consents in the cases specially mentioned in ss. 31 and 33; and such purchases, by s. 28, might be made in consideration of *a sum in gross, or of an annual rent* to be secured as

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mentioned in the act; and the contracts, conveyances, and assurances were to be enrolled with the clerk of the peace.

The commissioners had very large powers conferred upon them for regulating not only the navigation but also the tolls and lock dues as well as the rates for carriage of goods and hire of horses upon the river, and with authority to determine all complaints, subject to appeal. It also appears from s. 24, as well as from the 7th section, that in some places there were at that time no horse towing paths, and that the towing had there been done by men, but that the extension of the horse towing paths was then contemplated. There are powers given to the commissioners to borrow money on the security of the tolls; and by s. 55 there is a general power to appeal to the quarter sessions against any orders of the commissioners.

The next act which is material is 28 Geo. 3, c. 51. The preamble refers to money having been raised and expended in making horse towing paths, &c.; and by s. 2 the tolls and moneys to be raised or paid under that act or the former acts, and the property in the lands and works erected or purchased by the commissioners, were *vested* in them, and they were empowered to sue and prosecute for injury to any of the towing paths, &c., by virtue of the acts purchased, rented, *hired*, or used for the benefit of the navigation.

By s. 5 they had further borrowing powers conferred upon them; and by s. 6 it is enacted that for providing a *fund* for securing the money borrowed, with interest, and for *repairing and maintaining the navigation*, the commissioners shall have power to settle and direct *the taking of such tolls and rates as they shall think necessary, within certain limits, for barges, and also for horses used in towing, for the use of (inter alia) the towing paths* 465] *and ways then or *to be thereafter made, purchased, or hired* by the commissioners on the navigation.

The commissioners, by s. 18, had power to make bye-laws as to the rates for towing, for the use of any towing paths, and for carrying on, repairing, and regulating the navigation, subject to the general power of appeal given by s. 24.

By 35 Geo. 3, c. 106, s. 18, further powers were given to five of the committee to survey and view the river, and *to hear and examine evidence as to the state and condition of the navigation, and the wants of repairs, amendments, alterations, and improvements therein*, and to make reports to the general meetings of the commissioners of all alterations, improvements, repairs, and other works which they should think needful or proper to be done at any place or places for the benefit and improvement of the navigation, and to cause estimates to be made of the expense of doing such works; and when the commissioners ordered any works the

committee of five of them might take on themselves the management, direction, and execution of them, and give orders to the surveyors, and others to proceed in the execution of such works, and the expenses, after having been reported and allowed by a general meeting of the commissioners, were to be paid out of the moneys raised under the Acts.

By s. 22 the commissioners were to make satisfaction to parties aggrieved, damaged, or injured by the works, and with a power of appeal as there provided.

The 23d section authorized the purchasing and making by the commissioners of a *free, continued, uninterrupted, and public* horse towing path throughout the whole of the navigation, without interruption or impediment, the commissioners making compensation for the lands taken, and for all losses and damages by reason of the taking of lands or grounds for making a towing path, way, or road for the use of the navigation.

The next and last Act was that by which the powers, rights, and duties of the commissioners were transferred to the present defendants, viz., the Thames Navigation Act, 1866. The title of that Act is "An Act for vesting in the conservators of the Thames the conservancy of the upper part of the river;" and some of the objects for which the defendants were thereby incorporated, as *mentioned in the preamble, were "the [466 preservation and improvement of the streams, bed, and banks of the upper part of the Thames, as a matter of great local and public importance." The Act recites that the locks and works under the previous control of the commissioners were in a very bad and dangerous condition, and that their income had long been insufficient to defray *the necessary expenses of the repair and maintenance* of the locks and works, and that considerable debts had been incurred by the previous commissioners.

By ss. 25, 26, and 30, the powers, authorities, rights, and interests, duties and obligations of the former commissioners were transferred to the defendants.

As to certain locks, dams, and weirs existing on the navigation before the passing of the Act of 1866, the owners of them were entitled to take toll, and were bound to repair them; but by this Act the traffic was relieved from the tolls payable to these private owners, the property in these locks, dams, and weirs was transferred to and vested in the defendants; and the obligation to maintain and repair them was by express words imposed upon the defendants: see the preamble, and s. 43 of this act.

By s. 55 the defendants were authorized to take tolls and charges for the navigation, and under s. 70 to borrow money on the security of the tolls; and their funds were to be applied

by the defendants under s. 88, first, *inter alia*, in defraying the expenses of *the repair and maintenance of the works* vested in or acquired or constructed by them by or under that Act, and sixthly, in *carrying into execution the purposes of that Act*. There are no words directly imposing the obligation to repair the banks and towing paths upon the defendants, as is the case with respect to the locks, dams, and weirs by s. 43; but then the towing-paths and the right to take tolls for passing along them are not absolutely transferred to the defendant in the same manner as the locks, dams, and weirs; so that there was no necessity for any such express enactment with respect to the towing paths; and the powers, rights, duties, obligation, and liability of the defendants with respect to the towing paths and banks must be ascertained by reference to the provisions of the former Acts, as well as to the general scope and language of this Act.

467] *It appears from the earlier acts already mentioned that originally there were *owners*, and by subsequent acts *tenants or occupiers of the towing paths*, who took toll for horses passing along them, and that *such persons were bound to keep the towing paths in repair*; and by those statutes the commissioners had extensive powers of supervision and control over the towing paths, and power to make orders respecting them, and to regulate the toll to be taken by the persons entitled to take it. They subsequently acquired power to purchase and take lands compulsorily, and to execute works for the purpose of the navigation, and by the act of 28 Geo. 3, c. 5, s. 6, were authorized *themselves to take toll for*, amongst other things, *the towing paths purchased or hired by them*; and there are similar expressions in the next section as to towing paths purchased or hired by the commissioners.

By the later act of 35 Geo. 3, c. 106, ss. 18 and 23, they obtained power to execute any works or repairs that they thought needful or proper, and to pay for them out of the rates and tolls, and also to make and establish a continued horse and towing path throughout the navigation, and to purchase land for that purpose. And by the last act, of 1866, the present defendants are authorized to take the tolls, and by s. 88 are bound to apply their funds,—first, in defraying the expenses of the repair and maintenance of the works vested in or acquired or constructed by them under that act; and, sixthly, in carrying into execution the purposes of that act, which, as it incorporates, necessarily includes the purposes of the former acts. These purposes, as stated in the preamble of the last act, as well as in the former acts, are, the preservation, repairs, maintenance, and improvement of the navigation, and which would, we think, include the banks and towing paths.

The defendants in pursuance of the powers vested in them,

made arrangements in 1866 to secure the use of the towing path at the place in question for the purpose of the navigation; and it was agreed on the argument that the defendants under that arrangement now pay an annual rent per rod to the owner of the soil of the towing path, and take an aggregate toll in one sum at Teddington Lock for the use of the entire navigation and towing paths: and it is to be taken as a fact that the defendants have under the provisions of the statute acquired and have the use of *the whole of the towing paths along the river, and [468 the right to take toll in respect of the use of them, as well as for the use of the navigation generally.

Somewhat similar acts of parliament were under consideration in the case of *Budjer v. South Yorkshire Railway and River Dun Co.* (¹), and the navigation company there, as in this case, appeared to have paid an annual sum to the owner of the towing path, in order to secure the use of it for the public. It was considered by the Court of Exchequer that the company had thereby acquired the soil in the towing path; but this decision was afterwards reversed by the Exchequer Chamber; and that Court decided that the company had acquired only an easement over the towing path, such as was necessary for the purposes of the undertaking, and that the arrangement for payment of an annual sum was a purchase within the meaning of the statutes. The Court of Exchequer Chamber also laid down that, generally speaking in the absence of express words, the Courts were not inclined to infer that statutes of this kind gave more than such a use of the soil as was necessary for the purposes of the navigation; and a similar view was taken by the Court of Exchequer in the case of *Stracey v. Nelson* (²); with respect to commissioners of sewers.

It is quite true that the arrangement in the present case between the commissioners and the owner of the towing path was by parol only; but the owner of the land letting the right to use the towing path, and receiving a rent for it, must be taken to know the powers of the conservators, and to have assented that they might have done that which was necessary to enable the public to have and enjoy the use of the towing paths, including the power to repair them, upon the same principle that, where the use of a thing is granted, everything is granted by which the grantee may have and enjoy such use: *Pomfret v. Ricroft* (³). And with respect to a question which was raised as to what is to be deemed the towing path, it seems to us that it is impossible to confine it to the mere beaten track which is described to have been made principally by single horses towing down stream, for, in towing up stream, the horses cannot always be in a direct

(¹) 1 E. & E., 349.(²) 12 M. & W., 535.(³) 1 Wms. Saund., 322.

469] line, and there must be space for *them as well as for the driver and for the proper use of the tow line; and we think the towing path must be taken to include so much of the bank as is necessary and proper for the purposes of towing barges, and is reasonably and properly used as such, and which in this case would include that part of the bank which gave way.

The defendants having acquired the towing path in the manner before mentioned for the use of the public, subject to the payment by the public of the toll to them, they invited the public to use the towing path and to pay them the toll. They have also employed their superintendent and their engineer from time to time to inspect and report on the banks and towing paths; and it was proved to be part of the duties of the engineer to see if the banks were being washed away.

The plaintiff in this case was lawfully using the towing path with his horses in towing a barge, for which the proper toll had been paid to the defendants and for the purpose of the navigation.

It was alleged by the plaintiff that the towing path was in an unsafe and dangerous state, and that in consequence his horses fell into the river and were drowned; whilst the defendants alleged that the bank was in a safe and proper condition, and that the accident arose from the fault of the driver of the horses or of the man who had charge of the barge. No question was raised (indeed, upon the evidence there was no ground for contending), that, if the bank was in a dangerous state, and it was the defendants' duty to maintain it, they had been guilty of negligence in that respect.

The case having been left to the jury, they found that the towing path and banks were not in a proper condition relatively to the purpose and proper use of them as a towing path; that this was the cause of the accident to the plaintiffs' horses; and that there was no neglect in the navigation of the barge or in the management of the horses. The verdict was thereupon entered for the plaintiff for 100*l.*, the value of the horses, subject to the point which was reserved as to the liability of the defendants in point of law; and this question was to be raised without reference to the particular form of the pleadings.

470] *A rule accordingly obtained by the defendants to enter the verdict in their favor; and upon the argument the plaintiff contended that the case fell within the principle which was established by the case of *Mersey Docks v. Gibbs* ⁽¹⁾. In that case it was laid down that the general rule of construction of statutes like the present was, that, in the absence of something to show a contrary intention, the legislature intends that the body created

(1) Law Rep., 1 H. L., 93.

by the statutes shall have the same duties, and that its funds shall be subject to the same liabilities, as the general law would impose upon a private person having and exercising the same rights; and that the trustees in that case were bound to take reasonable care that their works were in such a state as that the public might use them without danger.

In the case of *Nichol v. Allen* ⁽¹⁾, it was held that a person being authorized to make a bridge, and to take a toll upon it, was liable to repair it, upon the principle that, taking the benefit of the tolls, he must bear the burthen of the repairs; and it was considered that the statutes in that case contemplated that both the tolls and the liability to repair should go together. This was also in accordance with the decision in the earlier case of *Mayor of Lyme Regis v. Henley* ⁽²⁾, and was confirmed by the case of *Parnaby v. Lancaster Canal Co.* ⁽³⁾, and the decision of the house of Lords in the *Mersey Docks Case* ⁽⁴⁾.

Upon the true construction of the statutes in this case,—construed according to the rule laid down in the cases cited,—we are of opinion that the defendants had power to maintain and repair the towing path. They had provided that towing path under the acts of Parliament for the use of the public; they invited the public to use it; and they took a toll, as they are authorized to do, for the use of it; and it appears to us, therefore, that they were bound to take reasonable care that the towing path was in a reasonably fit condition to be used as a towing path, and that the present case does fall within the principle of the decision in *Mersey Docks v. Gibbs* ⁽⁵⁾ and the other cases to which we have referred, and must be governed by them.

*It is also to be observed that after having acquired the [471 right to use the towing path from the owner of the soil, and having the power themselves to repair and maintain it, it would be very strange if they were at liberty to make orders upon the owner to do the repairs, whilst they received the toll from the public.

It was contended for the defendants that there was no public right of towing on the banks of the river; and the case of *Bull. v. Herbert* ⁽⁶⁾ was relied upon by the defendants in support of this view; but that case only decided that there was no such right merely at common law; and the decision in fact affirmed, that there may be, and in fact is, on most navigable rivers, such a public right by custom, and that slight evidence of usage would generally be sufficient to support it on the ground of the public convenience.

⁽¹⁾ 1 B. & S., 916; 31 L. J. (Q. B.), 43;
in error, 1 B. & S., 934; 31 L. J. (Q. B.),
204.

⁽²⁾ 1 Bing. N. C., 222; 2 Cl. & F., 331.

⁽³⁾ 11 Ad. & E., 230.

⁽⁴⁾ Law Rep., 1 H. L., 93.

⁽⁵⁾ Law Rep., 1 H. L. 93.

⁽⁶⁾ 3 T. R., 253.

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We see no objection to a dedication of a way to the public for such a limited purpose: and in *Rex v. Severn and Wye Navigation* (¹), Holroyd, J.; and Bayley, J., both laid it down, and we think correctly, that a towing path may be a highway, to be used only for the purpose of towing barges or vessels.

It was further contended that, if a public right of way existed for the purpose of towing, the parish alone had the power and were liable to the duty of repairing it; but we can find no sufficient grounds in fact or law, under the circumstances of this case, and upon the proper construction of these statutes, for supporting that contention: nor is this case like some which were suggested, such as that of a road washed away by the sea, where no person or body may be liable to repair or restore it. The authorities to which we have already referred seem effectually to dispose of this point.

It was further contended that, if there was a public right of towing upon the river banks, and the defendants were bound to repair them, the only remedy for breach of that duty was by indictment; and that no action could be maintained by an individual. But, if the duty of keeping the towing paths and banks in repair be imposed upon the defendants, and they have neglected that duty, we are at a loss to understand upon what principle it can be said that a person who has sustained a particular injury from such neglect, and which is not common to 472] the public at large, is precluded from maintaining an action to recover damages for the injury which he has thus individually sustained. The cases before referred to are direct authorities in favor of the plaintiff upon this point also.

It was further contended that the defendants did not collect the tolls for their own advantage, but merely as trustees for the benefit of the public. But, in the *Mercy Docks Case* (²), that circumstance was held not to make any difference in principle with respect to the liability in such cases; and all the grounds upon which it was sought to distinguish this case from the previous cases have in our judgment entirely failed.

Some questions were raised as to the sufficiency of the declaration, and which are material only for the purpose of the demurrers; but, as the defendants denied their liability altogether, under any form of declaration, it was arranged that the plaintiff should be at liberty to make any such amendments as he might be advised, *consistently with the facts of the case and the finding of the jury*, and which he is still at liberty to make if he thinks fit.

Our decision upon the main point of the case in favor of the plaintiff; and the rule obtained by the defendants to enter the verdict for them under the leave reserved at the trial will there-

(¹) 2 B. & A., 649.

(²) Law Rep., 1 H. L., 93.

fore be discharged, and judgment will be entered for the plaintiff on the demurrers, upon the present or the amended form of the declaration, at the option of the plaintiff.

The remaining point argued before us was that the verdict was against the weight of the evidence, and that there ought to be a new trial on that ground. Upon reading the notes of the evidence, we have not been able to satisfy ourselves that the verdict is so clearly against the weight of evidence that it ought to be set aside. But, at the same time, the Lord Chief Justice, before whom the cause was tried, has certified to us that he is dissatisfied with the verdict; and, under any other circumstances than those which have occurred, we should almost certainly have thought it right in deference to such an opinion, that the case should undergo further investigation before another jury. But it must be remembered that this was a second verdict obtained by the plaintiff, and after the first verdict in his favor had been set aside. The questions left to the jury [473] were peculiarly matters within their province; the evidence upon them was contradictory; and, two special juries having, after the summing up by the presiding judge, found their verdict upon all the points submitted to them in favor of the plaintiff; and as we see little or no probability that another jury would be likely to come to a different conclusion upon a third trial, we think we ought not to send the case down for trial again, and that the rule, so far as it relates to a new trial, should also be discharged.

Rule discharged.

Judgment on the demurrers for the plaintiff.

Attorneys for plaintiff: Wilkinson & Howlett.

Attorneys for defendant: Hall, for Frere & Co.

June 3, 1872.

*HARRIS and others v. SCARAMANGA and others. [481

[Law Reports, 7 Common Pleas, 481.]

Marine Insurance — Foreign Average Statement.

A cargo of rye was insured for 4160*l.* from Taganrog to Bremen. The policy contained the usual memorandum, "Corn, &c., are warranted free from average unless general or the ship be stranded," &c., and in the margin were the following conditions, — "To pay general average as per foreign statement, if so made up. Warranted free from particular average unless the ship or craft be stranded, sunk, or burnt; but this warranty not to exonerate the underwriter from the liability to pay any special charges for mats, warehousing, forwarding, or otherwise, if incurred, as well as partial loss arising from transshipment. Warranted free from capture and seizure and the consequence of any attempt thereat."

After leaving Taganrog, the vessel encountered severe weather, and was compelled to put into two several ports for repair, at each of which the captain, in order to enable him to obtain funds to put her in a condition to continue her voyage gave a bottomry bond on ship, freight and cargo, the aggregate of which with interest, on the arrival of the ship at Bremen, amounted to 2818*l.* 10*s.* 5*d.*

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The captain being unable to discharge this obligation, the consignees of the cargo, in order to obtain delivery thereof, paid the amount.

On the 3d of August, 1868, a statement was prepared by an average stater in Bremen, in which the loss arising upon the bottomry bonds was apportioned between the ship and freight and the cargo, as follows:— 1088*l.* 14*s.* 11*d.* as falling upon the cargo, and 1185*l.* 11*s.* upon the ship and freight. The captain being unable to pay or give security for the 1185*l.* 11*s.* so charged upon ship and freight, the vessel was sold under an order of the Tribunal of Commerce at Bremen, and produced 729*l.* 10*s.* 2*d.* leaving a balance due to the holders of the bonds (the 1088*l.* 14*s.* 11*d.*, having been paid) of 663*l.* 2*s.* 10*d.* On the 3rd of October a "further or supplemental average statement" was made by the average stater, in which the last mentioned sum was stated as "the amount which the cargo had to pay as additional bottomry debt" to the holders of the bonds. These "average statements" were (upon a special case) admitted to be accurate, and correctly made up in accordance with the law in force in Bremen; and it was further admitted that "such a loss as that which occurred in this case is treated at Bremen as a general average loss and not as a particular average loss."

Held: that the underwriters were bound by the average statements so made, and consequently that the assured were entitled to recover the 663*l.* 2*s.* 10*d.*

SPECIAL CASE stated for the opinion of the Court, pursuant to a judge's order.

The action was upon a policy of insurance for 4160*l.* upon a cargo of rye on board the *Bella Leandra*, at and from Taganrog to Bremen, to recover a loss of 663*l.* 2*s.* 10*d.* The policy contained the usual memorandum: "Corn, fish, salt, fruit, flour, and seed are warranted free from average, unless general or the 482] ship be *stranded. Sugar, tobacco, hemp, flax, hides, and skins are warranted free from average under 5*l.* per cent.; and all other goods, also the ship and freight, are warranted free from average under 3*l.* per cent. unless general or the ship be stranded." The following conditions were inserted in the margin of the policy: "To pay general average as per foreign statement, if so made up. Warranted free from particular average unless the ship or craft be stranded, sunk, or burnt; but this warranty not to exonerate the underwriters from the liability to pay any special charges for mats, warehousing, forwarding, or otherwise, if incurred, as well as partial loss arising from transshipment. Warranted free from capture and seizure and the consequences of any attempt thereat."

The declaration contained special counts on the policy, for a general average loss, and on the suing and laboring clause, and for a loss according to a foreign average statement made up within the terms of the policy, and also the common money counts. The defendants pleaded a denial of the general average loss and a denial of the loss under the suing and laboring clause, and that the claim upon the policy had been satisfied by payment, and never indebted to the money counts.

1. The plaintiffs and the defendants are cornfactors, and carry on their business respectively in London, where the policy in question was underwritten by the defendants.

2. The plaintiffs bought the cargo of rye of the defendants on behalf of their principals, Messrs. Bacmeister & Stone. Bacmeister & Stone sold the cargo to Kneist & Todeman, who again sold it to Bolte & Co., of Bremen. The policy and bill of lading of the rye were first handed by the defendants to the plaintiffs, who passed them on to their principals, Bacmeister & Stone. Thus, ultimately, the documents came into the hands of Bolte & Co., as final owners of the cargo.

3. The *Bella Leandra* was an Italian vessel. She sailed from Taganrog on the voyage insured on or about the 22nd of September, 1867, having the cargo of rye on board. After leaving Taganrog she encountered very severe weather, and was in the month of October, 1867, compelled to put into Constantinople, in distress. There the master, in order to raise the money necessary for repairs so as to enable the ship to continue the voyage, executed *a bottomry bond, dated the 17th of [483 February, 1868, on the ship, freight, and cargo, to secure the repayment of 2120*l.* with maritime interest at 11 per cent., which on the ship's arrival amounted to 2353*l.* 4*s.*, to Hermann Helbing, merchant of Constantinople, who advanced him that sum. It was to be assumed for the purposes of the case that this bond (a translation of which was annexed) was valid and binding on the cargo.

4. The *Bella Leandra* sailed from Constantinople on or about the 23d of February, 1868, and again met with very bad weather; and on or about the 26th of March, 1868, the captain was compelled to put into Malta, in distress. There, again, in order to raise the money necessary for repairs so as to be able to continue the voyage, the captain executed a bottomry bond, dated the 29th of April, 1868, on ship, freight, and cargo. The last mentioned bond was for 442*l.* 15*s.*, with maritime interest of 5*l.* per cent., which on the arrival of the ship at Bremen amounted to 465*l.* 6*s.* 5*d.*, and was in favor of Ignazio Buttigeig, merchant of Malta. It was to be assumed for the purposes of the case that this bond (a translation of which was annexed) was valid and binding on the cargo.

5. Messrs. Bolte & Co., who are merchants carrying on business at Bremen, had in the meantime become the purchasers of the rye; and this action is brought by the plaintiffs as trustees for and on behalf of Bolte & Co.

6. The ship sailed from Malta on or about the 1st of May, and on or about the 25th of June she arrived at Bremen, Bolte & Co. being the consignees of the cargo.

7. The bond which was executed at Constantinople had been indorsed by Helbing to the order of Bolte & Co., who took it

up; and on the arrival of the ship at Bremen the captain was unable to pay the same or any part thereof.

8. The bond which was executed at Malta had been indorsed by Buttigeig to the order of and was taken up by the defendants and by them indorsed to Fritz & Co. of Bremen; and, as the captain was unable to redeem the same, Fritz & Co. demanded payment thereof from Bolte & Co., the consignees of the cargo. Bolte & Co., in order to prevent the holders thereof from covering their claims by a sale of the cargo or some part [484] of it, and in order to *obtain delivery of the cargo, took up the bond and paid off the holders thereof. By taking this course, which was the only course they could take, Bolte & Co. obtained delivery of the cargo.

9. A statement of average dated the 3d of August, 1868, was prepared by Heinrich Fecklenborg, an average stater in Bremen, in which the loss arising upon the bottomry bonds was apportioned between the cargo and the ship and freight. By that statement the amount of 1088*l.* 14*s.* 11*d.* was the proportion shown as falling upon the cargo, and 1185*l.* 11*s.* was shown as falling upon the ship and freight.

10. No question was raised as to the 1088*l.* 14*s.* 11*d.*, which it was admitted was properly chargeable on the defendants as underwriters on the cargo; and the defendants had paid the same to Bolte & Co. accordingly.

11. The captain was unable to pay or to give any security for the 1185*l.* 11*s.*, the proportion of the loss so falling on the ship and freight according to the said average statement, or any part thereof.

12. Messrs. Bolte & Co., in order to obtain payment of the 1185*l.* 11*s.*, the proportion of the bottomry moneys so falling upon the ship and freight, applied to the tribunal of commerce at Bremen (being a court of competent jurisdiction in that behalf) to order the ship to be sold and the proceeds to be applied in or towards the liquidation of the amount. The tribunal of commerce duly made the order; and, after the requisite public notices had been given, the ship was with due observance of all legal forms sold by public auction by one G. Steinmeyer, a ship-broker at Bremen, on or about the 12th of September, 1868, under the order of the tribunal of commerce, for 4450 thalers gold, equal to 729*l.* 10*s.* 2*d.* sterling or thereabouts, being the highest price that could be obtained for her; and the net proceeds of the sale were handed over to Bolte & Co. under the order of the tribunal.

13. After deducting the net proceeds of the said sale from the 1185*l.* 11*s.* so falling upon the ship and freight according to the average statement of the 3d of August, 1868, as aforesaid, there

remained a balance of 663*l.* 2*s.* 10*d.* of the sum so as aforesaid falling on the ship and freight, in respect of which Bolte & Co. were still unsatisfied: and a further or supplemental average. *statement, dated the 3d of October, 1868, was made up [485 by Fecklenborg, in which the 663*l.* 2*s.* 10*d.* was stated as the amount which the cargo had to pay as additional bottomry debt to Bolte & Co. It was admitted that the last mentioned average, statement of the 3d of October, 1868, as well as the former statement of the 3d of August, was in all respects accurate as to amounts and figures, and was correctly made up in accordance with the law in force in Bremen.

14. Such a loss as that which occurred in this case is treated at Bremen as a general average loss, and not as a particular average loss. At Bremen the German code of commercial law is by legislative enactment in force. The sections of that code which enunciate the principles of law more particularly applicable to the present case are articles 692, 695, 697, 735, 824, sub-s. 5, and 838, sub-s. 9. Either party was on the argument of the case to be at liberty to refer to a copy of the Code which was identified by several witnesses under a commission sent to Bremen. The following is a translation of the above mentioned articles:

Art. 692. All the objects hypothecated are jointly and severally liable to the bottomry creditor. Even before his claim becomes due, the creditor can after the arrival of the vessel in the port of destination of the bottomry voyage apply for an arrest of all the bottomried objects.

Art. 695. The master shall not deliver the bottomried cargo, either entirely or partially, before the creditor has been paid or properly secured; otherwise, the master is personally answerable to the creditor for the bottomry debt so far as he could at the time of their delivery have been paid by the goods so given up. Until the contrary is proved, it shall be considered that the creditor could have been paid in full.

Art. 697. If the amount of bottomry is not paid when due, the creditor may apply to the proper court to order the sale of the ship and cargo on which bottomry has been taken, as also to hand over the bottomried freight. The action shall be brought, as far as the ship and freight are concerned, against the master or owner; as to the cargo, if before its delivery, against the master; after its delivery, against the consignee, so long as it is in his own possession or in the custody of any person holding it for his account.

Art. 734. If the master, in order to continue his voyage, for the purpose of an expenditure that does not come under general average, has hypothecated the cargo, or has disposed of the cargo by sale or by appropriation, the loss sustained by one proprietor of the cargo by reason that his claim for indemnification cannot be at all or cannot be fully satisfied out of the ship and freight (art. 509, 510, 618) shall be borne by all the proprietors of the cargo, according to the principles of general average. In ascertaining the loss, the indemnification indicated in art. 713 is applicable in relation to the proprietors of the cargo in all cases, especially also in the case of the second paragraph of art. 618. For the value [486 by which this indemnification is determined, the goods sold shall contribute to a general average, if such occurs.

Art. 735. The contributions to be paid under the stipulations of art. 687, and art. 734 are in all respects placed on the same footing as contributions in cases of general average.

Art. 824. The insurer bears all risks to which ship or cargo is exposed during the continuance of the insurance, if not otherwise determined by the following provisions, or by contract. He bears, in particular,—sub-s. 5,—the risk of the hypothecation of the insured goods for the purpose of continuing the voyage or of the disposal of the same by sale or by hypothecation for the like purposes (art. 507, 510, 734).

Art. 838. The insurer is liable for,—sub-s. 1,—the contributions to general average, including those which the insured has to bear on account of a loss suffered by him. The contributions which by art. 637 and 734 are subject to the principles of general average, shall be accounted tantamount to contributions to general average.

If ship and cargo are hypothecated together, each has to contribute its proportion towards the discharge of the amount for which they have been hypothecated, as if the loss were a general average loss; and, should the ship be unable to discharge its proportion of liability, the owners of the cargo would, in addition to discharging the proportion of liability attaching to the cargo, have to make up the deficiency as a general average loss.

This deficiency would be made good to the owners of the cargo by their underwriters, if the owners of the cargo had insured their interest. If this case, therefore, had been decided at Bremen, the defendants would have been held liable by the tribunals there to make good to Bolte & Co., the whole of the 663*l.* 2*s.* 10*d.*

15. The defendants refused to pay to the plaintiffs, as trustees for Bolte & Co., the 663*l.* 2*s.* 10*d.*, or any part thereof. The Court was at liberty to draw inferences of fact.

The question for the opinion of the Court was, whether the plaintiffs, as trustees for Bolte & Co., were entitled to recover from the defendants the 663*l.* 2*s.* 10*d.*, or any part thereof.

April 22. *Sir G. Honyman*, Q.C. (*M. Leod* with him), for the plaintiffs, submitted that the average statement of the 3d of August, 1868, mentioned in par. 9 of the special case, and the further or supplemental statement of the 3d of October, 1868, mentioned in par. 13 were “foreign statements” made up within the meaning of the memorandum in the policy, and that the 487] *663*l.* 2*s.* 10*d.* claimed was a general average loss for which the defendants were liable under those “foreign statements,” or one of them. [He referred to *Dent v. Smith* ⁽¹⁾ and to the cases collected in *Arnould on Insurance*, ed. 1866, pp. 814, 820, et seq.]

Watkin Williams (with him, *Cohen*), for the defendants. The 663*l.* 2*s.* 10*d.* is not general average loss at all according to the law of this country,—not a loss from any of the perils insured against. Even according to the law of Bremen, it was not general average loss, nor is it so stated by the foreign average stater, but an additional burthen imposed upon the plaintiff by reason

(¹) *Law Rep.*, 4 Q. B., 414.

of the failure of the ship owner to pay the proportion of the bottomry debt charged upon the ship and freight. And, assuming it to be general average loss by the law of Bremen, it is not a loss by any peril insured against by this policy. The object of this memorandum was, not to add to or extend the risks which the insurers agreed to take upon themselves under the policy, but a mere provision that, if there be a general average loss arising from a peril insured against, the underwriters will pay it according to the foreign average statement, if made. The underwriters agree to adopt the foreign law as to the statement of average, but only to pay general average when occasioned by the happening of a peril insured against according to the English law. [The following authorities were cited: *Benecke on Insurance*, 165; 2 *Parsons on Insurance*, 431; *Power v. Whitmore* (1); *Hallett v. Wigram* (2); *Powell v. Gudgeon* (3); *Sarguy v. Hobein* (4); *Great Indian Peninsula v. Saunders* (5); *Booth v. Gair* (6); *Kidston v. Empire Marine Insurance Company* (7). *Fletcher v. Alexander* (8) was also referred to.]

Sir G Honyman, Q.C., in reply. The defendants are bound by the finding in the 13th and 14th paragraphs that the statements made out by M. Fecklenborg on the 3d of August and 3d of October, *1868, were "average statements" according to the law of Bremen. He referred to *Dickenson v. Jardine* (9). *Cur. adv. vult.*

June 3. The judgment of the Court (Bovill, C. J., and Keating Brett, JJ.), was delivered by

BOVILL, C.J. This action was brought to recover from the underwriters on goods the amount of an alleged general average loss sustained by the plaintiffs as owners of a cargo of rye by the *Bella Leandra* insured on a voyage from Taganrog to Bremen.

Upon that voyage the vessel with her cargo on board having reached Bremen, that was the proper port for the adjustment of any claim or liability for general average, and the adjustment would have to be made there according to the law of Bremen, and would be binding as between the shipowner and the owners of the cargo. It does not, however necessarily follow that an underwriter upon an ordinary form of policy would be liable for the whole or even any part of the general average so adjusted. If the sacrifice or loss which occasioned the general average arose from any of the perils insured against or the consequences of

(1) 4 M. & S., 141.

(2) 9 C. B., 580.

(3) 5 M. S., 431.

(4) 2 B. & C., 7; in error, 4 Bing., 13.

(5) 1 B. & S., 41; 2 B. & S., 266; 30 L. J. (Q. B.), 218; 31 L. J. (Q. B.), 208.

(6) 15 C. B. (N.S.), 291; 33 L. J. (C.P.), 99.

(7) Law Rep., 1 C. P., 535; in error, Law Rep., 2 C. P., 357.

(8) Law Rep., 3 C. P., 375.

(9) Law Rep., 3 C. P., 639.

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them, or from proper endeavors to avert such perils or their consequences, to that extent the underwriters would, under the terms of an ordinary policy, and according to well known maritime usage, be liable to indemnify the assured, though, as between the ship owner and the owner of the cargo, matters might be introduced into the statement of general average for which the underwriters, upon the ordinary form of policy, would not be liable.

There are also many differences in the laws of various countries as to what are to be deemed the proper subjects of general average, as well as with respect to the proportions or value in or upon which the apportionment should be made; and under these circumstances the present policy was entered into with a special memorandum as to general average. By that memorandum, in addition to the ordinary insurance in the body of the policy, the underwriters agree "*to pay general average as per foreign statement, if so made up,*" with certain special warranties as to particular average and capture or seizure.

489] *It seems to me that the general effect of the memorandum is, to make the underwriters liable as for general average for whatever the owners of the goods might be called upon to pay on that account by the foreign statement of adjustment. This memorandum was probably introduced in order to avoid all questions, not only as to the propriety of particular items being treated as the subjects of general average, but also as to the correctness of the apportionment; and I find it difficult to place any other reasonable construction upon the terms of the policy and memorandum.

If it be open to this Court to consider and determine the question whether the 663*l.* 2*s.* 10*d.* claimed in this action, or any part of it, was properly the subject of general average according to the law of England, I should be of opinion that it was not, and that this was not a loss covered by an ordinary policy in the usual form. So, if we had to determine whether this sum was strictly general average according to the law of Bremen as set forth in the special case, it might well be argued that it is not strictly general average, but is merely to be treated in a similar manner by the law of that place.

It seems to me, however, that, under the terms of this policy, the underwriters and the assured have both agreed to accept the adjustment and statement of the average stated in the foreign report, if and when made, as conclusive between them, both in principle and in details, as to the loss which the underwriters are to undertake in respect of general average, subject to the exception of any matters, such as capture or seizure, which are excluded by the express terms of the policy.

In this case a maritime lien on the cargo was created by the bottomry bonds, and which involved a liability of the cargo to make good any deficiency caused by the insufficient value of the ship to cover its own proportion of the bottomry debts; and the necessity for giving the bottomry bonds and creating that lien arose from perils of the seas, though these debts would not necessarily be the subject of general average as against the underwriters, according to the law of England, or, possibly, by the law of Bremen. How, then, is the question to be determined, of whether the claim in this case is to be considered as general average for which the underwriters are liable? Is it to [490] be determined by this Court, or by the statement of the foreign average stater?

It seems to me that, by the express agreement of the parties, contained in the memorandum, it is not open to us to determine it, and that we have only to see whether the foreign adjustment which gives rise to this claim has been in fact made or not. Has there, then, been such a statement of general average made in Bremen with respect to the amount now claimed? and how does the matter stand upon the facts as stated in the special case?

The plaintiffs contend that there was such a statement. The defendants, on the other hand, contend that there was no such statement, and that the passages in the case as to the statement of October do not treat it as a statement of general average, but as a mere calculation of the deficiency arising upon the sale of the ship, from the proceeds of that sale being insufficient to pay the amount apportioned to the ship and freight, and that this loss therefore cannot be considered as coming within the perils or terms of the policy.

Now, what are the statements in the special case upon this subject?

In par. 13, it is said that a *further or supplemental average statement*, dated the 3d of October, 1868, *was made up* by the said H. Fecklenborg (who had been previously described as an average stater in Bremen), in which the 663*l.* 2*s.* 10*d.* was stated as the amount which the cargo had to pay as additional bottomry debt to Messrs. Bolte & Co. (which is in accordance with the fact), and that a translation of the average statement was annexed to and formed part of the case. It is further mentioned that *the last mentioned average statement* of the 3d of October, 1868, as well as the former statement of the 3d of August, was in all respects accurate as to amounts and figures, and *was correctly made up in accordance with the law in force in Bremen*. It is also stated in par. 14 that such a loss as that which had occurred in the principal case was treated at Bremen as a *general average loss*, and not as a particular average loss; and at the end of that paragraph it is

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further stated that, if this case had been decided at Bremen, the defendant would have been held liable by the tribunals there to make good to Messrs. Bolte & Co. the whole of the 663*l.* 2*s.* 10*d.*

Upon these facts thus stated, I am of opinion that the state-
491] ment *of the 3d of October must be considered and treated by the court as a foreign statement of general average made up at Bremen, within the terms of the special memorandum on this policy; and that, as neither of the exceptions or warranties is applicable to the case, the question of the liability of the underwriters to pay the amount now in question is conclusively settled against them; that it is not competent for this court to inquire into the propriety of that foreign average statement; and that our judgment therefore ought to be in favor of the plaintiffs.

In this view of the case, it becomes unnecessary to go through the authorities or to discuss the elaborate arguments which were very ably addressed to us by the learned counsel for the defendants. If his contention be correct, it would equally have entitled his clients to dispute each item in the original average statement of the 3d of August on the ground that it was not properly the subject of general average or that it did not arise from any of the perils covered by the policy. But it appears to me that the intention and effect of the policy and memorandum were that all such questions should be excluded in all cases where a foreign statement of general average had been made up, as it was in this case, at the proper port of adjustment abroad; and that the underwriters, by this policy, as between themselves and the assured, agreed to be bound by the opinion and decision of the foreign average stater, both as to facts and law, on the subject of the general average in the statement which he might make up in the foreign port. I think the underwriters agreed to pay according to that statement, with the exception of any matters which are expressly excluded by other parts of the policy (but which are not applicable to this case), and that the plaintiffs are entitled to recover from the underwriters the whole of the sum claimed in this action.

My brother Keating concurs in this judgment.

BRETT, J. In this special case the question ultimately in dispute was, whether the plaintiffs, the assured, as trustees for Messrs. Bolte & Co., were entitled to recover from the defendants, the underwriters, a sum of 663*l.* 2*s.* 10*d.*

The plaintiffs, merchants in London, had insured with the
492] *defendants as underwriters in London, by a policy dated the 23d of July, 1867, a cargo of rye on board the Italian vessel the *Bella Leandra*, on a voyage from Taganrog to Bremen. The vessel, after sailing on the voyage insured, was compelled

by severe weather to put into Constantinople in distress; and the master there, in order to raise money necessary for repairs so as to enable the ship to continue her voyage, executed a bottomry bond on the ship, freight, and cargo, to secure the repayment of 2353*l.* 4*s.* on the ship's arrival at Bremen. The ship, having sailed from Constantinople, was compelled by further severe weather to put into Malta in distress, and the master was there obliged to execute another and similar bottomry bond on ship, freight, and cargo, to secure repayment at Bremen of 465*l.* 6*s.* 5*d.* The vessel arrived at Bremen, and the captain was unable to take up either bond. Messrs. Bolte & Co., who had become owners by purchase of the cargo of rye, took up both bonds, and, in order to obtain delivery of the cargo, paid off the holders of both. This was found by the case to be the only course by which the Messrs. Bolte & Co. could obtain possession of the cargo. The special case then found that "a statement of average," dated the 3d of August, 1868, was prepared by an average stater in Bremen, in which the loss arising upon the said bottomry bonds was apportioned between the cargo and the ship and freight. By "the said statement" the amount of 1088*l.* 14*s.* 11*d.* was the proportion shown as falling upon the cargo, and the amount of 1185*l.* 11*s.* was shown as falling upon the ship and freight. No question, it was stated in the case, arises as to the sum of 1088*l.* 14*s.* 11*d.*, the proportion by that adjustment falling on the cargo, which it is admitted is properly chargeable on the defendants as underwriters; and the defendants have paid the same: but the captain was unable to pay or give any security for the sum of 1185*l.* 11*s.*, the proportion falling on the ship and freight. Messrs. Bolte & Co. thereupon applied to the Tribunal of Commerce at Bremen to sell the ship, which was accordingly duly done, and the net proceeds of the sale were handed to Messrs. Bolte & Co. After deducting the said net proceeds from the sum of 1185*l.* 11*s.*, there remained a balance of 663*l.* 2*s.* 10*d.* in respect of which Messrs. Bolte & Co. were still unsatisfied. The special case then continued: And "a further or supplemental average statement," dated the 3d of October, 1868, was made up by [493 the same average stater, in which the said sum of 663*l.* 2*s.* 10*d.* was stated as the amount which the cargo had to pay as additional bottomry debt to Messrs. Bolte & Co. A translation, it was said, "of the last mentioned average statement" is annexed, &c. It is admitted that "the said last mentioned average statement" is correctly made up in accordance with the law in force in Bremen. "Such a loss as that which has occurred in the present case is treated at Bremen as a general average loss, and not as a particular average loss." It was admitted on the argu-

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ment that the last paragraph was intended to apply to the loss of the 663*l.* 2*s.* 10*d.*

The case then stated that the German Code was in force as law at Bremen, and set out several sections or articles of the Code: and then it was stated as a fact that, according to that law, "if ship and cargo are hypothecated together, each has to contribute its proportion towards the discharge of the amount for which they have been hypothecated, as if the loss were a general average loss; and, should the ship be unable to discharge its proportion of liability, the owners of the cargo would, in addition to discharging the proportion of liability attaching to the cargo, have to make up the deficiency *"as a general average loss."* This deficiency would be made good to the owners of the cargo by their underwriters, if the owners of the cargo had insured their interest. If this case, therefore, had been decided at Bremen, the defendants would have been there held liable to make good to Messrs. Bolte & Co. the whole of the said sum of 663*l.* 2*s.* 10*d.* The Court was to be at liberty to draw inferences of fact.

The policy was, as to the body of it, in the ordinary form of an English Lloyd's policy, with the ordinary enumerated risks. But in the margin there were written, among other provisions, the following:— "To pay general average as per foreign statement, if so made up." "Warranted free from particular average, unless the ship or craft be stranded, sunk, or burnt; but this warranty not to exonerate the underwriters from the liability to pay any special charges for mats, warehousing, forwarding, or otherwise, if incurred, as well as partial loss arising from transshipment." "Warranted free from capture and seizure, and the consequences of any attempt thereat."

494] *Upon this case Mr. Watkin Williams, in an able argument, every part of which seemed to me to deserve and require the utmost attention, contended that the defendants, English underwriters of an English policy, were not liable in respect of the 663*l.* 2*s.* 10*d.* He maintained that the loss of Messrs. Bolte & Co. in respect of that sum was not a general average loss according to English law, or according to the law of Bremen; that it was not stated or made up as a general average loss in the Bremen average statement; and, even if it were a general average loss according to the law of Bremen, and were so stated in conformity with such law, or if it was so stated in fact, but erroneously according to Bremen law, and if in either case the defendants were bound by it as a foreign adjustment of a loss to be taken as a general average loss, yet that the defendants were not liable, because it was not a loss arising from any peril insured against by this English policy.

Now, in the first place, I agree that this was not a general average loss according to the law of England. There was a general average loss incurred during the voyage insured, by reason of the necessity arising from sea perils of the ship putting into two different ports of distress, and being necessarily repaired in order to enable the voyage to be completed for the benefit of all concerned: but all the contribution of the owners of cargo to that loss which can properly be called a general average contribution according to the English law was included in the first average statement, dated the 3d of August, 1868. It is true that the loss of the 663*l.* 2*s.* 10*d.* was necessarily incurred by Messrs. Bolte & Co. as owners of the cargo by reason of the cargo being bound by the bottomry bonds; and it is true that the loss was the result of sea perils, in the sense that without the happening of such perils the loss would not have been incurred: but this particular loss was not the immediate or the necessary result of any effort to avoid a peril of the sea. It was the immediate result of the insolvency of the ship owner, or of the want of means or credit of the master, and of the deficiency in value on sale of the ship, contingencies which might or might not have happened after the perils of the sea had happened, and without the happening of some one or more of which the particular loss would not have occurred, notwithstanding the occurrence of the perils of the sea.

*Moreover, the payment of the 663*l.* 2*s.* 10*d.* was made [495 after the completion of the voyage and the safe arrival of the ship and cargo, and was not made for the common advantage of ship, freight, and cargo, but upon consideration of a balance of advantage and loss to the owner of cargo alone. It was made in order to obtain possession of the cargo.

But, as to the second point, I think that, upon this special case as stated, the Court is bound to hold that the loss was a general average loss according to the law of Bremen. The allegations made at the beginning and end of par. 14 seem to me to amount to express findings on the point. I further think that, upon the allegations made in paragraphs 13 and 14, treated as they are in the fourth of the defendants' points⁽¹⁾, and it being admitted that the words "such a loss as that which has occurred," at the commencement of par. 14, refer to the sum of 663*l.* 2*s.* 10*d.*, we are bound to hold, either as upon an express finding or as upon an inference of fact to be drawn, that the loss of the 663*l.* 2*s.* 10*d.* was stated by the average stater at Bremen as and

⁽¹⁾ That the clause, "To pay general average as by foreign statement, if so made up," is not to be extended to make the underwriters liable for a loss by way of general average which is not a general average loss according to English law.

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with intent to be a general average loss falling on the owner of cargo.

The next point to be determined is, whether, under such circumstances, underwriters of an ordinary English policy would be liable. That raises the question as to how far underwriters of such a policy on an insured voyage to terminate at a foreign port are bound by a foreign general average adjustment made at that port of destination. Now, I think it is clearly established that, upon such a policy, English underwriters are bound by the foreign adjustment as an adjustment, if made according to the law of the country in which it was made. They are bound although the contributions are apportioned between the different interests in a manner different from the English mode, or though matters are brought into or omitted from general average which would not be so treated in England. I further incline to think, notwithstanding the case of *Powcr v. Whitmore* ⁽¹⁾, that underwriters, if they are not absolutely bound to accept the 496] foreign adjustment as rightly made, if *bonâ fide* made, must assume it to be rightly made, if *bonâ fide* made, until the contrary be proved. It seems to be stated as a general principle of insurance law that, "when a general average is fairly stated in a foreign port, and the assured is obliged to pay his proportion of it, he may recover the amount from the insurer, *though the average may have been settled differently from what it would have been at the home port*:" 2 Phillips on Insurance, § 1414, citing *Depan v. Ocean Insurance Co.* ⁽²⁾. And further on in § 1414 it is thus stated: "The *lex loci* is, that underwriters shall reimburse general averages, if within the perils, insured against, according to the apportionments made and contributions exacted abroad at the port of destination." But I think that, according to English and American law, the underwriter of a policy in the ordinary form is not liable to indemnify against any general average loss or contribution, whether it be general according to the law of his own country or according to the law of the foreign country in which the voyage terminates, or whether the adjustment be made according to his domestic or to the foreign law, if the general average loss be not incurred, or the general average contribution be not made, in order to avert loss by a peril insured against.

I do not find this doctrine so clearly expressed in the English books or cases as I should have expected. But the statements in Phillips on Insurance—a book of the highest authority as to English as well as American insurance law—are clear and precise. "Underwriters are liable to make indemnity by payment of either a particular or general average or total loss *only in case*

⁽¹⁾ 4 M. & S., 141.

⁽²⁾ 5 Cowen, 63.

of its being caused by the perils insured against :” 2 Phillips, § 1353. It is obvious that this must be so in case of a particular average loss or a total loss. And a general average loss, as meaning the loss to the person who suffers damage, is no more than a particular average loss to each of the parties who has to suffer or contribute in respect of it. By the word “general,” it is only meant that the loss is to be generally distributed, or the contribution to be generally made by all. It is the loss to each and all caused by a sea peril, which must in this as in other cases be the loss caused by a peril insured against. “so far as general average is occasioned by *perils insured against,” says Phillips, [497 “the insurers are liable for it in proportion to the amount insured :” § 1409. “General average is only payable, says Mr. Justice Story, where it is a consequence, or result, or incident of some peril insured against :” see *Sherwood v. General Mutual Insurance Co.* (1) quoted in 2 Phillips on Insurance, 3d ed. p. 173, § 1414.

So far, then, except as to the true meaning of the special case itself, I have gone almost entirely with the arguments and propositions put forward by Mr. Williams ; but it is the force and truth of them which now make me break from his next point.

If these propositions be true, and the conclusion in which he asks us to concur be correct, the proviso in the margin of the policy seems to me to be of no real effect. The same interpretation and effect would be practically given to a policy in the ordinary form, that is, to this policy without the marginal provision. This policy, being an English policy, is to be construed according to English rules of construction ; and among those rules are two, first, that the Court must, if possible, give some effect to words apparently used as words of obligation in a written instrument made between parties ; and the other, that the words are rather to be construed so as to impose a burthen on the person who apparently assumes them as obligatory. Mr. Williams contended that effect would be given to the proviso by holding that it met the case, otherwise unmet, of an average statement erroneously made according to the law of the foreign port. But, in the first place, I have already expressed an opinion that such a statement, by virtue of which the assured would be just as much compelled to pay his appointed contribution as by a correct statement, is binding on the underwriters ; and if not, I cannot adopt the view that this important stipulation is introduced in contemplation only of a foreign average stater not knowing how to conduct his own business according to the law of his own country.

It is well known, says Mr. Phillips, in the paragraph I have

(1) 1 Blatchford's Rep., 251.

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so often quoted, viz. § 1414, amongst underwriters and merchants that there is a diversity in the effect of foreign adjustments. Three such recognized diversities are then pointed out. The third is thus stated: "When a loss is included in a general average in one *country, which is not insured against in the policies of another, the underwriters in the latter certainly ought not to be liable to indemnify the assured against the proportion of a foreign adjustment of such a loss." This is, of course, averred with respect to policies in the ordinary forms.

It seems to me that the only way to give effect to the marginal provision in this case, and an effect as against the underwriter who has by it taken upon himself some real substantial obligation different from his ordinary obligation, is, to say that it was intended to meet this recognized diversity, and to oblige the underwriter to indemnify the assured against a loss which should fall upon him by compulsion in the port of Bremen, and which should be there treated as against him as a general average loss or contribution, unless such loss so treated should be a consequence of an attempt at capture or seizure. Upon such a construction of the policy, the defendants are under the circumstances liable to the plaintiffs in respect of the disputed sum of 663*l.* 2*s.* 10*d.*

This decision makes it unnecessary to determine whether the present case is within the principle of the decision in *Dent v. Smith* ⁽¹⁾, or what is the legal principle upon which that case was decided. I cannot, however, help expressing the greatest doubt whether the present case can be brought within the principle on which I understand the decision in that case to have been founded, viz. that there was in that case *before the completion of the voyage insured* a total loss by shipwreck, and a detention of the cargo in the hands of a foreign government, and a detention by the foreign government to the end, so that a total loss could only be overcome by a payment exacted by such foreign government.

I am of opinion that judgment should be entered for the plaintiff for 663*l.* 2*s.* 10*d.* *Judgment for the plaintiffs.*

Attorneys for plaintiffs: *M^cLeod & Watney.*

Attorney for defendants: *James H. Coterill.*

(¹) Law Rep., 4 Q. B., 414.

May 30, 1872.

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VARLEY v. COPPARD.

[Law Reports, 7 Common Pleas, 505.

Lease—Covenant against Assignment—Partners.

A and B, partners in trade, were assignees of a lease which contained a covenant by the lessee for himself and his assigns, that he would not, neither should

his executors, administrators, or assigns, assign the demised premises without the consent in writing of the lessor. On the dissolution of the partnership, A assigned all his interest in the premises to B:

Held, a breach of the covenant.

The declaration alleged that the plaintiff, by deed bearing date the 29th of February, 1868, let to J. C. Watson a messuage, to hold from the 29th of February, 1868, for the term of six years, to be computed from the 25th of December, 1867, less and except the last three days of the same term; that Watson by the deed, for himself and his assigns, covenanted with the plaintiff that during the term the lessee should not, neither should his executors, administrators, or assigns, at any time or times assign the demised premises without the consent in writing of the plaintiff, his executors, &c., first obtained prior to such assignment; that afterwards, during the term, Watson, with the consent in writing of the plaintiff first obtained, assigned all his estate in the messuage to the defendant and D'Aeth, and the same thereby became vested in them; that afterwards during the term the defendant assigned all his estate and interest in the messuage to D'Aeth without the consent in writing of the plaintiff first obtained prior to such assignment: and that, by reason of the premises, the plaintiff had lost and would be deprived of the rent payable in respect of the premises, and had been deprived of the benefit of the covenant of the lease against the defendant, &c.

Demurrer, on the ground that the assignment to D'Aeth was not a breach of covenant. Joinder.

Gibbons, in support of the demurrer. No doubt this is a covenant running with the land: *Williams v. Earle*.⁽¹⁾ But such a covenant, like a covenant which involves a penalty, is to *be construed strictly: *West v. Dobb*.⁽²⁾ The question is [506 whether an assignment by one of two joint lessees to the other is a breach of the covenant not to assign "the demised premises." In *Crusoe d. Blencowe v. Bughy* ⁽³⁾, a lessee for twenty-one years, with a covenant not to demise, assign, transfer, or set over, or otherwise do or put away the indenture or the premises thereby demised, or any part thereof, without consent demised the premises for fourteen years; and it was held that this was not a breach of the covenant. The Court, after time taken to consider, said: "The Courts of Westminster have always looked nearly into these conditions, covenants, or provisoes; that the devising a term was a *doing or putting it away*, that a lessee becoming a bankrupt was a *putting or doing it away*, that a dying intestate was a *putting it away*; so, being in debt, by confessing a

⁽¹⁾ Law Rep., 3 Q. B., 739.

Law Rep., 5 Q. B., 460.

⁽²⁾ Law Rep., 4 Q. B., 634; in Ex. Ch.

⁽³⁾ 3 Wils., 234.

them, or from proper endeavors to avert such perils or their consequences, to that extent the underwriters would, under the terms of an ordinary policy, and according to well known maritime usage, be liable to indemnify the assured, though, as between the ship owner and the owner of the cargo, matters might be introduced into the statement of general average for which the underwriters, upon the ordinary form of policy, would not be liable.

There are also many differences in the laws of various countries as to what are to be deemed the proper subjects of general average, as well as with respect to the proportions or value in or upon which the apportionment should be made; and under these circumstances the present policy was entered into with a special memorandum as to general average. By that memorandum, in addition to the ordinary insurance in the body of the policy, the underwriters agree "*to pay general average as per foreign statement, if so made up,*" with certain special warranties as to particular average and capture or seizure.

489] *It seems to me that the general effect of the memorandum is, to make the underwriters liable as for general average for whatever the owners of the goods might be called upon to pay on that account by the foreign statement of adjustment. This memorandum was probably introduced in order to avoid all questions, not only as to the propriety of particular items being treated as the subjects of general average, but also as to the correctness of the apportionment; and I find it difficult to place any other reasonable construction upon the terms of the policy and memorandum.

If it be open to this Court to consider and determine the question whether the 663*l.* 2*s.* 10*d.* claimed in this action, or any part of it, was properly the subject of general average according to the law of England, I should be of opinion that it was not, and that this was not a loss covered by an ordinary policy in the usual form. So, if we had to determine whether this sum was strictly general average according to the law of Bremen as set forth in the special case, it might well be argued that it is not strictly general average, but is merely to be treated in a similar manner by the law of that place.

It seems to me, however, that, under the terms of this policy, the underwriters and the assured have both agreed to accept the adjustment and statement of the average stater in the foreign report, if and when made, as conclusive between them, both in principle and in details, as to the loss which the underwriters are to undertake in respect of general average, subject to the exception of any matters, such as capture or seizure, which are excluded by the express terms of the policy.

In this case a maritime lien on the cargo was created by the bottomry bonds, and which involved a liability of the cargo to make good any deficiency caused by the insufficient value of the ship to cover its own proportion of the bottomry debts; and the necessity for giving the bottomry bonds and creating that lien arose from perils of the seas, though these debts would not necessarily be the subject of general average as against the underwriters, according to the law of England, or, possibly, by the law of Bremen. How, then, is the question to be determined, of whether the claim in this case is to be considered as general average for which the underwriters are liable? Is it to [490 be determined by this Court, or by the statement of the foreign average stater?

It seems to me that, by the express agreement of the parties, contained in the memorandum, it is not open to us to determine it, and that we have only to see whether the foreign adjustment which gives rise to this claim has been in fact made or not. Has there, then, been such a statement of general average made in Bremen with respect to the amount now claimed? and how does the matter stand upon the facts as stated in the special case?

The plaintiffs contend that there was such a statement. The defendants, on the other hand, contend that there was no such statement, and that the passages in the case as to the statement of October do not treat it as a statement of general average, but as a mere calculation of the deficiency arising upon the sale of the ship, from the proceeds of that sale being insufficient to pay the amount apportioned to the ship and freight, and that this loss therefore cannot be considered as coming within the perils or terms of the policy.

Now, what are the statements in the special case upon this subject?

In par. 13, it is said that a *further or supplemental average statement*, dated the 3d of October, 1868, *was made up* by the said H. Fecklenborg (who had been previously described as an average stater in Bremen), in which the 663*l.* 2*s.* 10*d.* was stated as the amount which the cargo had to pay as additional bottomry debt to Messrs. Bolte & Co. (which is in accordance with the fact), and that a translation of the average statement was annexed to and formed part of the case. It is further mentioned that *the last mentioned average statement* of the 3d of October, 1868, as well as the former statement of the 3d of August, was in all respects accurate as to amounts and figures, and *was correctly made up in accordance with the law in force in Bremen*. It is also stated in par. 14 that such a loss as that which had occurred in the principal case was treated at Bremen as a *general average loss*, and not as a particular average loss; and at the end of that paragraph it is

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further stated that, if this case had been decided at Bremen, the defendant would have been held liable by the tribunals there to make good to Messrs. Bolte & Co. the whole of the 663*l.* 2*s.* 10*d.*

Upon these facts thus stated, I am of opinion that the state-
491] ment *of the 3d of October must be considered and treated by the court as a foreign statement of general average made up at Bremen, within the terms of the special memorandum on this policy; and that, as neither of the exceptions or warranties is applicable to the case, the question of the liability of the underwriters to pay the amount now in question is conclusively settled against them; that it is not competent for this court to inquire into the propriety of that foreign average statement; and that our judgment therefore ought to be in favor of the plaintiffs.

In this view of the case, it becomes unnecessary to go through the authorities or to discuss the elaborate arguments which were very ably addressed to us by the learned counsel for the defendants. If his contention be correct, it would equally have entitled his clients to dispute each item in the original average statement of the 3d of August on the ground that it was not properly the subject of general average or that it did not arise from any of the perils covered by the policy. But it appears to me that the intention and effect of the policy and memorandum were that all such questions should be excluded in all cases where a foreign statement of general average had been made up, as it was in this case, at the proper port of adjustment abroad; and that the underwriters, by this policy, as between themselves and the assured, agreed to be bound by the opinion and decision of the foreign average stater, both as to facts and law, on the subject of the general average in the statement which he might make up in the foreign port. I think the underwriters agreed to pay according to that statement, with the exception of any matters which are expressly excluded by other parts of the policy (but which are not applicable to this case), and that the plaintiffs are entitled to recover from the underwriters the whole of the sum claimed in this action.

My brother Keating concurs in this judgment.

BRETT, J. In this special case the question ultimately in dispute was, whether the plaintiffs, the assured, as trustees for Messrs. Bolte & Co., were entitled to recover from the defendants, the underwriters, a sum of 663*l.* 2*s.* 10*d.*

The plaintiffs, merchants in London, had insured with the
492] *defendants as underwriters in London, by a policy dated the 23d of July, 1867, a cargo of rye on board the Italian vessel the *Bella Leandra*, on a voyage from Taganrog to Bremen. The vessel, after sailing on the voyage insured, was compelled

by severe weather to put into Constantinople in distress; and the master there, in order to raise money necessary for repairs so as to enable the ship to continue her voyage, executed a bottomry bond on the ship, freight, and cargo, to secure the repayment of 2353*l.* 4*s.* on the ship's arrival at Bremen. The ship, having sailed from Constantinople, was compelled by further severe weather to put into Malta in distress, and the master was there obliged to execute another and similar bottomry bond on ship, freight, and cargo, to secure repayment at Bremen of 465*l.* 6*s.* 5*d.* The vessel arrived at Bremen, and the captain was unable to take up either bond. Messrs. Bolte & Co., who had become owners by purchase of the cargo of rye, took up both bonds, and, in order to obtain delivery of the cargo, paid off the holders of both. This was found by the case to be the only course by which the Messrs. Bolte & Co. could obtain possession of the cargo. The special case then found that "a statement of average," dated the 3d of August, 1868, was prepared by an average stater in Bremen, in which the loss arising upon the said bottomry bonds was apportioned between the cargo and the ship and freight. By "the said statement" the amount of 1088*l.* 14*s.* 11*d.* was the proportion shown as falling upon the cargo, and the amount of 1185*l.* 11*s.* was shown as falling upon the ship and freight. No question, it was stated in the case, arises as to the sum of 1088*l.* 14*s.* 11*d.*, the proportion by that adjustment falling on the cargo, which it is admitted is properly chargeable on the defendants as underwriters; and the defendants have paid the same: but the captain was unable to pay or give any security for the sum of 1185*l.* 11*s.*, the proportion falling on the ship and freight. Messrs. Bolte & Co. thereupon applied to the Tribunal of Commerce at Bremen to sell the ship, which was accordingly duly done, and the net proceeds of the sale were handed to Messrs. Bolte & Co. After deducting the said net proceeds from the sum of 1185*l.* 11*s.*, there remained a balance of 663*l.* 2*s.* 10*d.* in respect of which Messrs. Bolte & Co. were still unsatisfied. The special case then continued: And "a further or supplemental average statement," dated the 3d of October, 1868, was made up by [493 the same average stater, in which the said sum of 663*l.* 2*s.* 10*d.* was stated as the amount which the cargo had to pay as additional bottomry debt to Messrs. Bolte & Co. A translation, it was said, "of the last mentioned average statement" is annexed, &c. It is admitted that "the said last mentioned average statement" is correctly made up in accordance with the law in force in Bremen. "Such a loss as that which has occurred in the present case is treated at Bremen as a general average loss, and not as a particular average loss." It was admitted on the argu-

ment that the last paragraph was intended to apply to the loss of the 663*l.* 2*s.* 10*d.*

The case then stated that the German Code was in force as law at Bremen, and set out several sections or articles of the Code: and then it was stated as a fact that, according to that law, "if ship and cargo are hypothecated together, each has to contribute its proportion towards the discharge of the amount for which they have been hypothecated, as if the loss were a general average loss; and, should the ship be unable to discharge its proportion of liability, the owners of the cargo would, in addition to discharging the proportion of liability attaching to the cargo, have to make up the deficiency *"as a general average loss."* This deficiency would be made good to the owners of the cargo by their underwriters, if the owners of the cargo had insured their interest. If this case, therefore, had been decided at Bremen, the defendants would have been there held liable to make good to Messrs. Bolte & Co. the whole of the said sum of 663*l.* 2*s.* 10*d.* The Court was to be at liberty to draw inferences of fact.

The policy was, as to the body of it, in the ordinary form of an English Lloyd's policy, with the ordinary enumerated risks. But in the margin there were written, among other provisions, the following:—"To pay general average as per foreign statement, if so made up." "Warranted free from particular average, unless the ship or craft be stranded, sunk, or burnt; but this warranty not to exonerate the underwriters from the liability to pay any special charges for mats, warehousing, forwarding, or otherwise, if incurred, as well as partial loss arising from transshipment." "Warranted free from capture and seizure, and the consequences of any attempt thereat."

494] *Upon this case Mr. Watkin Williams, in an able argument, every part of which seemed to me to deserve and require the utmost attention, contended that the defendants, English underwriters of an English policy, were not liable in respect of the 663*l.* 2*s.* 10*d.* He maintained that the loss of Messrs. Bolte & Co. in respect of that sum was not a general average loss according to English law, or according to the law of Bremen; that it was not stated or made up as a general average loss in the Bremen average statement; and, even if it were a general average loss according to the law of Bremen, and were so stated in conformity with such law, or if it was so stated in fact, but erroneously according to Bremen law, and if in either case the defendants were bound by it as a foreign adjustment of a loss to be taken as a general average loss, yet that the defendants were not liable, because it was not a loss arising from any peril insured against by this English policy.

Now, in the first place, I agree that this was not a general average loss according to the law of England. There was a general average loss incurred during the voyage insured, by reason of the necessity arising from sea perils of the ship putting into two different ports of distress, and being necessarily repaired in order to enable the voyage to be completed for the benefit of all concerned: but all the contribution of the owners of cargo to that loss which can properly be called a general average contribution according to the English law was included in the first average statement, dated the 3d of August, 1868. It is true that the loss of the 663*l.* 2*s.* 10*d.* was necessarily incurred by Messrs. Bolte & Co. as owners of the cargo by reason of the cargo being bound by the bottomry bonds; and it is true that the loss was the result of sea perils, in the sense that without the happening of such perils the loss would not have been incurred: but this particular loss was not the immediate or the necessary result of any effort to avoid a peril of the sea. It was the immediate result of the insolvency of the ship owner, or of the want of means or credit of the master, and of the deficiency in value on sale of the ship, contingencies which might or might not have happened after the perils of the sea had happened, and without the happening of some one or more of which the particular loss would not have occurred, notwithstanding the occurrence of the perils of the sea.

*Moreover, the payment of the 663*l.* 2*s.* 10*d.* was made [495 after the completion of the voyage and the safe arrival of the ship and cargo, and was not made for the common advantage of ship, freight, and cargo, but upon consideration of a balance of advantage and loss to the owner of cargo alone. It was made in order to obtain possession of the cargo.

But, as to the second point, I think that, upon this special case as stated, the Court is bound to hold that the loss was a general average loss according to the law of Bremen. The allegations made at the beginning and end of par. 14 seem to me to amount to express findings on the point. I further think that, upon the allegations made in paragraphs 13 and 14, treated as they are in the fourth of the defendants' points (¹), and it being admitted that the words "such a loss as that which has occurred," at the commencement of par. 14, refer to the sum of 663*l.* 2*s.* 10*d.*, we are bound to hold, either as upon an express finding or as upon an inference of fact to be drawn, that the loss of the 663*l.* 2*s.* 10*d.* was stated by the average stater at Bremen as and

(¹) That the clause, "To pay general average as by foreign statement, if so made up," is not to be extended to make the underwriters liable for a loss by way of general average which is not a general average loss according to English law.

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Alexander v. Vanderzee.

APPEAL from a decision of the Court of Common Pleas discharging a rule to enter a *monsuit*.

The action was brought to recover 582*l.* 7*s.* 8*d.* damages sustained by the plaintiff by reason of an alleged breach by the defendant in rejecting certain maize tendered to him by the plaintiff in execution of a contract of sale. The cause was tried before Brett, J., at the London sittings after Trinity Term, 1871. The facts were as follows: On the 10th of October, 1868, the plaintiff entered into a contract with Spartali & Co., merchants of London, for the purchase from them of 10,000 quarters, 10 per cent. more or less, of Danubian maize, upon the terms of the following contract-note:

"London, October 10th, 1868.

"Sold by order and for account of Messrs. Spartali & Co., London, to our principals, 10,000 quarters, 10 per cent. more or less (seller's option), Danubian maize fair average quality of the season and port of shipment when shipped. To be shipped from Danube and [or] Sulina and [or] Kustendjee, seller's option, by three or 531 more *first-class vessels, at seller's option, A. 1, A. 1, in red, 3-3ds, 5-6ths, 1. 1., or equal classification, in Austrian or Italian register (Greeks and Turks excepted). For shipment in June and [or] July, 1869 (old style), seller's option, at the price of 31*s.*, less 2 per cent., per quarter f. o. b. of 480lbs. delivered, including freight and insurance to any safe port in the united kingdom of Great Britain and Ireland, or continent between Havre and Hamburg if c-p contain option (buyers paying extra freight and insurance), calling at Queenstown, Falmouth, or Plymouth, &c., for orders, as per charterparty. Vessel to discharge afloat if so agreed; sufficient days to be allowed for discharging, reckoning provisionally 100 kilos equal to 232 qrs., and the weight at 58lbs. per bushel. No charge for damage. Railway weight, if from Kustendjee. If discharged on continent, out turn to be calculated at 50½ kilos, 112lbs. English. Payment, cash in London within seven days after presentation of invoice, less discount for unexpired portion of three months from date of bill of lading at 5 per cent. per annum, or at bank rate if over this, on the day on which the invoice is handed in exchange for bills of lading and policies of insurance effected with approved London underwriters, but for whose solvency sellers are not responsible. Damage by sea water or otherwise, if any, to be taken as sound. In case of sea accidents (pumping up grain excepted) causing a deficiency on invoice weight, provisional invoice quantity is to be final as to measure, and the weight is to be adjusted by the average weight of the sound grain delivered. Sellers to pay our brokerage of ½ per cent. Policies of insurance for 2 per cent. over the invoice amount including the 2½ per cent.; any amount over this to be for seller's account. In case of prohibition of export or blockade preventing shipment, the contract to be cancelled. Should any dispute arise, contract not to be void: it being agreed by buyers and sellers to leave the same to be settled by two London corn-factors respectively chosen, with power to call in an umpire, whose decision is to be final. Vessels to be of non-belligerent flag at time shipment commences, otherwise war risk is to be covered."

On the 14th of October it was agreed between the plaintiff and defendant that the latter should take the maize of Spartali & Co., and that the contract should be transferred to him, subject to the terms contained in the following memorandum indorsed upon the contract note.

"London, October 14, 1868.

"We have sold the within contract to Messrs. H. U. Vanderzee & Co., of London, at the price of 31*s.* per 480lbs., less 2 per cent., to U. K. for orders or direct port on continent between Havre and Hamburg; if latter, name of port to be given on signing bill of lading. No cargo to exceed 4000 qrs; and each cargo to be full

and complete, and on account of this contract alone; and each ship to carry no goods whatever for other consignees. Alexander & Co." (Signed)

In July, 1869, the plaintiff offered to deliver to the defendant, in part fulfilment of the contract, two cargoes of maize for the vessels *Murzi* and *Giacinto*. The bills of lading of these cargoes were dated respectively the 4th and 6th of June, 1869, O. S.; and the maize had been loaded on board these vessels at the following *dates, that is to say, the loading of the *Giacinto* [532 was commenced on the 12th of May, 1869, O. S., and she loaded 650 kilos in May, and it was completed on the 4th of June, O. S., 830 kilos having been loaded in June. The loading of the *Murzi* was commenced on the 16th of May, and was completed on the 6th of June, O. S., 800 kilos having been loaded in June. The defendant rejected the offer of these cargoes, and absolutely refused to take them.

During the time remaining for the fulfilment of the contract after the defendant had rejected the above two cargoes, there were in the market many cargoes of maize from the Danube of the stipulated quality and quantity, every portion of which had been shipped within the months of June and [or] July, which the plaintiff could have bought and delivered under the contract.

There was some evidence that a cargo of maize shipped in May is generally more liable to be heated than a cargo shipped in the month of June.

It was submitted for the defendant, 1. That the cargoes per *Murzi* and *Giacinto* were not cargoes which the defendant was bound to accept under the contract; 2. That the question of the construction of the contract was for the judge and not for the jury.

The learned judge left it to the jury to say whether in their opinion the cargoes in question were June shipments from Ibraila in the ordinary business sense of the term. The jury found that they were June shipments; and the judge thereupon directed a verdict for the plaintiff for 582*l.* 7*s.* 8*d.*, reserving leave to the defendant to move to enter a verdict for him or a nonsuit, if the court should be of opinion that the defendant was not bound to accept the above cargoes, as not being June shipments.

A rule nisi was afterwards obtained, but ultimately discharged: see W. N. for 1871, p. 225.

Butt, Q.C. (*Cohen* with him), for the appellant. A substantial part of the cargoes tendered having been shipped in May, they were not June shipments within the contract, and therefore the defendant had a right to reject them.

[BLACKBURN, J. I should say that the meaning of the contract

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was that the shipments were to be completed in June or July, so that the vessels might sail in either of those months. The jury have found them to be June shipments.]

533] *The construction of the contract was for the judge, and he ruled wrongly. In the absence of any evidence of usage, there was nothing to leave to the jury. According to the ordinary construction of the words of the contract, the loading must have commenced in June and finished in June or July. The plaintiff cannot rely upon the other cargoes alluded to, because none were tendered.

Sir G. Honyman, Q.C. (*Watkin Williams* with him) *contra*, was not called upon.

KELLY, C.B. The majority of the Court are of opinion that the judgment of the Common Pleas should be affirmed. For myself, I must confess I feel much disposed to say, that, as it was not suggested at the trial that the words of the contract had any technical meaning (in which case it would have been a question for the jury), but are words of ordinary use in the English language, its construction was for the judge. The natural meaning of the words, as it seems to me, is that the cargoes should be shipped in June or July, and not partly in May; particularly when I find that there was evidence that a May shipment was more likely to heat than a June shipment. But, as all my learned brethren entertain a contrary opinion, I do not desire to differ from them.

MARTIN, B. I think the judgment of the Court of Common Pleas was quite right. Mr. Butt invites us to hold that, if any part, that is, any substantial part, of the maize was put on board in May, the defendant was justified in rejecting it. That is not in my opinion the true construction of the contract. The words are "For shipment in June and [or] July, seller's option." The more intelligible meaning of those words, I think, is, not that the grain shall be ready for shipment in those months, not that it shall all be put on board in those months, but it shall be so loaded that the ship may sail in June or July. I think it was not a question for the judge, but for the jury; and that my brother Brett was quite right in leaving it to them.

BLACKBURN, J. I also am of opinion that the judgment of the Court below should be affirmed. Generally speaking, the construction 534] *of a written contract is for the Court, unless it contains words of a technical or conventional use in a particular trade, in which case it is for the jury. In the present case, I am not quite prepared to say, if the judge and the jury took different views of the meaning of the contract, which construction ought to prevail. The contract is for 10,000 qrs. of grain "for

shipment in June and [or] July, 1869." The construction contended for by Mr. Butt is that all the cargoes must be put on board not earlier than the 1st of June, or between that day and the 31st of July. The bill of lading would be given when the shipment was completed. A bill of lading commencing, "Shipped this 4th day of June," I should say, meant, not that the shipment was commenced in June, but that it was completed in June. And so I should construe this contract. And the jury, bringing to the consideration more knowledge of mercantile matters than a judge can possibly possess, came to the same conclusion.

MELLOR, J. I am entirely of the same opinion.

LUSH, J. I am of the same opinion. The words "for shipment in June or July" have no definite meaning, whether grammatical or otherwise. They may either mean that the shipment of the grain shall be completed in June or July, or that the whole shall be shipped within those months. I think the opinion of the jury was properly asked; and, with great deference to the Lord Chief Baron, I think the rule he adverted to is inapplicable here.

Judgment affirmed.

Attorneys for plaintiff: *Thomas & Hollams.*

Attorneys for defendant: *Simpson & Cullingford.*

June 19, 1872.

[*IN THE EXCHEQUER CHAMBER.]

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BRINSMEAD V. HARRISON.

[Law Reports, 7 Common Pleas, 547.]

Effect of a Judgment in an Action against one of several joint Tortfeasors.

A judgment in an action against one of several joint tortfeasors is a bar to an action against the others for the same cause, although such judgment remains unsatisfied.

ERROR upon a judgment for the defendant in the Court of Common Pleas.

Detinue for a pianoforte; Plea, that the act complained of was the joint act of the defendant and one Thompson, and that the plaintiff had recovered judgment in respect of it in an action against Thompson, which judgment still remained in force; replication, that the judgment was still unsatisfied; demurrer and joinder: see Law Rep., 6 C. P., 584.

Kelly (Shaw with him), for the plaintiff. The question is, whether the judgment recovered against Thompson, not shown to have been followed by satisfaction, is a bar to this action against a joint wrong-doer. The authorities which were relied upon in the Court below in support of the affirmative of that

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proposition, were *Brown v. Wootton* ⁽¹⁾, Com. Dig. *Action* (K. 4), and *King v. Hoare* ⁽²⁾. The dicta there found are, it is submitted, opposed to all the authorities before and since. Chief Baron Comyns cites *Yelverton*, 68, which refers to *Hitcham v. Murcham* ⁽³⁾. He also cites *Lendall and Pinfold's Case* ⁽⁴⁾, and *Anonymous* ⁽⁵⁾; but in each of these cases the plaintiff appears to have received satisfaction against the first wrong-doer. In *Cocke v. Jennor* ⁽⁶⁾, a release to one of two joint trespassers was held to discharge the other, because it is considered as satisfaction in law. Bro. Abr. *Judgment*, 98, and Vin. Abr. *Execution* (F. a), pl. 4, 5, 6, 7, (G. a.), also show that it is satisfaction which 548] operates as a bar, and not *the mere recovery of the judgment. Rol. Abr. *Execution*, F., is to the same effect. So, in *Foster v. Jackson* ⁽⁷⁾ and *Honey v. Rice* ⁽⁸⁾, stress is laid upon *satisfaction*. In *Drake v. Mitchell* ⁽⁹⁾, Lord Ellenborough says: "I have always understood the principle of transit in rem judicatum to relate only to the particular cause of action in which the judgment is recovered operating as a change of remedy from its being of a higher nature than before. But a judgment recovered in any form of action is still but a security for the original cause of action, until it be made productive in satisfaction to the party." So, in *Morris v. Robinson* ⁽¹⁰⁾, Holroyd, J., says: "Where in trover the full value of the article has been recovered, it has been held that the property is changed by judgment and *satisfaction of the damages*. Unless the full amount is recovered, it would not bar even other actions of trover." In *Walters v. Smith* ⁽¹¹⁾, counsel in argument referred to Com. Dig. *Audita Querela* (A), where it is said that, "if upon a joint trespass by A and B, there be a recovery against A in C B upon a declaration in London, and against B in B R upon a declaration in another county, and A *pays the whole*, B after he is taken shall have an audita querela," and added, "There must be an entire payment of the whole." Upon this Lord Tenterden remarks, "The mere recovery against one will not do." And Taunton, J., in giving judgment ⁽¹²⁾, says: "A release given to one of two joint contractors enures to the benefit of both; so a judgment *and satisfaction*, as to one is a stay of proceedings against the other." In *Marston v. Phillips* ⁽¹³⁾, Cockburn, C. J., says: "The authorities go to this length only, that, if the plaintiff obtains *satisfaction*, either in fact or in law, he

(1) Cro. Jac., 73; Yelv., 67; Moore, 762.

(2) 13 M. & W., 404.

(3) Noy., 4.

(4) 1 Leon., 19.

(5) 3 Leon., 122.

(6) Hob., 66.

(7) Hob., 52, at p. 59; 2 Broun., 311; Moore, 857.

(8) 2 Roll. Rep., 224.

(9) 3 East., 251, at p. 259.

(10) 3 B. & C., 196, at p. 206.

(11) 2 B. & Ad., 889, at p. 892.

(12) 2 B. & Ad., at p. 895.

(13) 9 L. T. (N. S.), 289.

shall not be allowed to recover in any other action the damages which he has *already obtained*; he is not to be permitted to obtain the chattel itself after having received damages in respect of it."

[BLACKBURN, J. That is an authority in support of the decision of the Court below on the new assignment. There was only an interlocutory judgment against the joint wrong-doer there.]

*The case of the *Vestry of Bermondsey v. Ramsey* ⁽¹⁾ is [549 also an authority to show that the mere recovery of a judgment is no bar. In giving the judgment of the Court, Montague Smith, J., cites the dictum of Lord Ellenborough in *Drake v. Mitchell* ⁽²⁾ already referred to. With the exception of the dictum of Parke, B., in *King v. Hoare* ⁽³⁾, down to the case of *Buckland v. Johnson* ⁽⁴⁾, in no case has the doctrine of *Brown v. Wootton* ⁽⁵⁾ been upheld. This subject has been well considered in the Supreme Court of the state of New York. In *Livingston v. Bishop* ⁽⁶⁾ it was held that, if separate suits be brought against several defendants for a joint trespass, the plaintiff may recover separately against each, but he can have but one satisfaction, and he may elect de melioribus damnis, and issue his execution therefor against one of them; and the other defendants will be obliged to pay the costs of the suits against them respectively. Kent, C.J., in giving judgment, said: "On looking into the books, with a view to this question, I was surprised to meet with so much contradiction and uncertainty on the subject. The cases are not all capable of being reconciled to each other, and some of them appear to me not reconcilable with reason. It is, however, a proposition that is not controverted, but everywhere admitted, that, for a joint trespass, the plaintiff may sue all the trespassers jointly, or each of them separately, and that each is answerable for the act of all. It would seem to result from this doctrine that a trial and recovery against one trespasser is no bar to a trial and recovery against another. If there can be but one recovery, it is in vain to say that the plaintiff may bring separate suits, for, the cause that happens to be first tried may be used by way of plea puis darrein continuance to defeat the other actions that are in arrear. The more rational rule appears to be that, where you elect to bring separate actions for a joint trespass, you may have separate recoveries, and but one satisfaction; and that the plaintiff may elect de melioribus damnis, and issue his execution accordingly; and that, where he has made his election, he is concluded by it; and that, if he should afterwards proceed against the other defendants, *they shall be re-

(1) Law Rep., 6 C. P., 247.

(2) 3 East, at p. 259.

(3) 13 M. & W., 494.

(4) 15 C. B., 145; 23 L. J. (C.P.), 204.

(5) Cro. Jac., 73; Yelv., 67; Moore, 702.

(6) 1 John. U. S., 290.

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lied on payment of their costs. This is agreeable to the rule laid down in *Sir John Heydon's Case* ⁽¹⁾. "The case of *Brown v. Wootton* ⁽²⁾ stands, however, opposed to this view of the subject, and it merits some attention. That was an action of trover for certain goods, and the defendant pleaded a judgment and execution in behalf of the plaintiff against one J. S. for the same goods; and the plea was held good. The Court took a distinction between a demand and a recovery of a thing certain and a thing uncertain; and they held that, in the first case, as where two are bound jointly and severally in a bond, a recovery and execution against one was no bar against the other without satisfaction; but, where the demand rests only in damages, as, in trespass, a recovery and judgment against one was a bar against the other, for the uncertain demand is now made certain by the judgment, and the plaintiff shall not resort to the uncertain demand again. In this case, there was a judgment and execution in the first case, and so far, therefore, as the opinion of the Court goes to declare that a judgment alone constituted a bar, the opinion was extrajudicial. The principle, however, which the Court went upon, between a demand for a thing certain and a thing uncertain, applied equally to both cases; and yet afterwards, in the case of *Claxton v. Swift* ⁽³⁾, which was an action of assumpsit, and, according to the forms of law, equally sounding in damages, the Court held that a recovery without satisfaction against the drawer was no bar to a suit against the indorser of a bill. The principle of the first case may be considered, therefore as in some degree shaken by this latter decision; for, in the language of the case of *Brown v. Wootton* ⁽²⁾, 'the thing uncertain is in both instances made certain by the judgment, and altered and changed into another nature.'" And, after referring to Bro. Abr. *Judgment*, pl. 98, *Morton's Case* ⁽⁴⁾, *Cocke v. Jennor* ⁽⁵⁾, *Corbet v. Burnes* ⁽⁶⁾, and *Bird v. Randall* ⁽⁷⁾, the learned judge concludes: "I am therefore inclined to question the extent of the decision in *Brown v. Wootton* ⁽²⁾, and to hold that a 551] recovery against one joint trespasser is not alone a bar to a suit against another. There must, at least, be an execution thereon," evidently meaning followed by *satisfaction*, "to bring a case within the facts on which that decision was founded; and that, perhaps, may be deemed an election by the plaintiff *de melioribus damnis*, and sufficient to conclude him." In a still more recent case in the Supreme Court of the United States, viz. *Lovjoy v. Murray* ⁽⁸⁾, it was held that a judgment against one joint trespasser is no bar to a suit against another for the

⁽¹⁾ 11 Co. Rep., 5.

⁽²⁾ Cro. Jac., 73; Yelv., 67; Moore, 732.

⁽³⁾ 3 Mod., 86; 2 Show., 494.

⁽⁴⁾ Cro. Eliz., 30.

⁽⁵⁾ Hob., 68.

⁽⁶⁾ W. Jones, 377.

⁽⁷⁾ 3 Burr., 1345.

⁽⁸⁾ 3 Wallace, 1.

same trespass; nothing short of *full satisfaction*, or that which the law must consider as such, can make such judgment a bar. *Brown v. Wootton* ⁽¹⁾ and *King v. Hoare* ⁽²⁾ were both cited there. [He also referred to *Jones v. Dovele* ⁽³⁾ and *Wilkinson v. Verity* ⁽⁴⁾.]

Powell, Q.C. (*Joyce* with him), *contra*, was not called upon.

KELLY, C.B. In this case a right of action has accrued to the plaintiff in respect of the wrongful detention of a pianoforte. This act was the joint act of two wrong-doers, the defendant and another. The defendant by way of plea alleges that an action was brought for the same cause against the other wrong-doer, and a judgment obtained against her, which remains in full force: and the question is whether that affords any defence to this action. That a judgment and execution, with satisfaction, would be a defence, is not disputed. A long series of authorities has so laid down: but it was doubted at one time whether judgment and execution, without satisfaction, was a bar also. It will be right, therefore, to consider whether this latter is not upon principle a good and valid defence. If it were held not to be a defence, the effect would in the first place be to encourage any number of vexatious actions wherever there happened to be several joint wrong-doers. An unprincipled attorney might be found willing enough to bring an action against each and every of them, and so accumulate a vast amount of useless costs if judgment against one of them did not operate as a bar to proceedings against the others. The mischief would not even rest there. Judgment having been recovered against one or more of *the wrong-doers*, and damages assessed if that judgment afforded no defence, the plaintiff might proceed to trial against another of them, and the second jury might assess a different amount of damages. Which amount is the plaintiff to levy? There are other grounds upon which it would be extremely inconvenient and unjust if a second action could be maintained. But, independently of the mischief which would result from holding the law to be as contended for by Mr. Kelly, let us see how the authorities stand. In the first place, there is no authority whatever, since the reigns of the Henrys and the Edwards nothing approaching to an authority has been cited, to show that such a plea as this would not be a good defence. In the absence, therefore, of authority to the contrary, and upon principle, and also upon what I conceive to be binding authorities in its favor, I come to the conclusion that such a plea as this affords a good defence. In the first place, we have the case of *Brown v. Wootton*, as reported in Cro. Jac. 73. There, as here, a joint wrong had been committed by two persons. An action

⁽¹⁾ Cro. Jac., 73; Yelv., 67; Moore, 752.

⁽²⁾ 13 M. & W., 494.

⁽³⁾ 9 M. & W., 19.

⁽⁴⁾ Law Rep., 6 C. P., 206.

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was brought against one, and a judgment obtained, but no satisfaction. A second action was brought against the other wrongdoer for the same cause, and he pleaded, as here, the judgment recovered in the first action. The judgment of the Court is in these terms: "All the Court held the plea to be good; for, the cause of action being against divers, for which damages uncertain are recoverable, and the plaintiff having judgment against one person for damages certain, that which was uncertain before is reduced in rem judicatam, and to a certainty." And Popham, C.J., adds: "If one hath judgment to recover in trespass against one, and damages are certain, *although he be not satisfied*, yet he shall not have a new action for this trespass. By the same reason, e contra, if one hath cause of action against two, and obtain judgment against one, he shall not have remedy against the other; and the alleging that he hath the one in execution for this cause is not an answer to the purpose: and the difference betwixt this case and the case of debt upon an obligation against two is, because there every one of them is chargeable and liable to the entire debt, and therefore a recovery against one is no bar against the other until satisfaction." This appears to me to be a satisfactory and binding authority: and the more so because I 553] find that one hundred and *fifty years afterwards it is quoted in a book of the highest authority, viz. Comyns's Digest, which alone would make it a satisfactory guide for us upon the present occasion. But it does not stop there, for, I find *Brown v. Wootton* ⁽¹⁾ and all the older cases referred to in *King v. Ilare* ⁽²⁾, where the question was fully and elaborately considered in the Court of Exchequer, and a judgment was pronounced by one of the most learned judges that ever sat in Westminster Hall. It is unnecessary to go through the enlightened and elaborate reasoning of that very learned person. Suffice it to say that he deals with the whole law upon the subject; and the result is thus summed up in the marginal note of the report of that case, a judgment in an action against one of two joint tortfeasors is a bar to an action against the other for the same cause. There being, then, this series of authorities, satisfactory of themselves, and having the sanction and approval of Chief Baron Comyns and Lord Wensleydale, notwithstanding the respect we entertain for the opinions and decisions of the American Courts, where a different view of the law seems to be entertained, I think we are bound to follow those of our own Courts, and to hold that, upon principle as well as upon authority, this plea is a good answer to the action, and consequently that the defendant is entitled to judgment.

BLACKBURN, J. I am of the same opinion. The question

⁽¹⁾ Cro. Jac., 73; Yelv., 67; Moore, 762.

⁽²⁾ 13 M. & W., 404.

raised upon this record is whether the claim of the plaintiff against two joint wrong-doers is put an end to by a judgment recovered in an action against one of them without showing that that judgment has been satisfied. I apprehend that it is, on the ground that transit in rem judicatam, or upon the general principle of convenience which is expressed in the maxim "Interest reipublicæ ut sit finis litium." It is for the general interest that, having once established and made certain his right by having obtained a judgment against one of several joint wrong-doers, a plaintiff should be allowed to bring a multiplicity of actions in respect of the same wrong? I apprehend it is not; and that, having established his right against one, the recovery in that action is a bar to any further proceedings against the others. It is unnecessary to go *into the earlier cases. [554] But, in the reign of James I, it was distinctly decided in *Brown v. Woolton* ⁽¹⁾ that a judgment recovered in trover might be pleaded in bar to a second action against a different person for the same cause, without averring satisfaction; "for," say the Court, "the cause of action being against divers, for which damages uncertain are recoverable, and the plaintiff having judgment against one person for damages certain, that which was uncertain before is reduced in rem judicatam, and to a certainty." Whether that which is added by Popham, C. J., is right or wrong, there is a distinct decision of the Court of Queen's Bench: and in the next century that great lawyer, Chief Baron Comyns, gives the high authority of his sanction to it. In more modern times, Baron Parke, probably the most acute and accomplished lawyer this country ever saw, holds the same doctrine in *King v. Hoare*. ⁽²⁾ I find no dictum of authority and no decision the other way. If this were res integra, I should have considered the American cases referred to entitled to great respect. But, for the reason given by the Court in *Brown v. Woolton* ⁽¹⁾, which works no injustice, and which has been acted upon for centuries, although no decision of a Court of error has been pronounced upon it, I think we are bound, even sitting in a Court of error, to decide in conformity with it. I observe that the Court of Common Pleas, in their judgment upon the demurrer to the new assignment, which is not now before us, held that by the recovery in the first action without satisfaction the property in the chattel did not pass. I should be inclined to agree to this, but it is unnecessary to express an opinion upon it.

MELLOR, J., and CLEASBY, B., concurred.

LUSH, J. I entirely agree with the rest of the Court. I think the matter is concluded by authority, the law as laid down in *Brown v. Woolton* ⁽¹⁾, in the time of James I, having been re-

⁽¹⁾ Cro. Jac., 73, Yelv., 67; Moore, 762.

⁽²⁾ 13 M. W., 494.

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cognized since by the high authorities referred to. If the reasons were not satisfactory to my mind, I might be induced to go along with the American decisions to which our attention has been called. But, after so long a series of decisions in our own 555] Courts, *I do not think we ought to yield to the opinions there expressed, whether they do or do not commend themselves to our judgment. The judges who decided those American cases seem to have thought that, by holding that recovery against one of two wrong-doers was a bar to an action against the other, they would be deciding that the property in the chattel passed by the recovery; but I do not think that by any means follows; and, as at present advised, I am prepared to adhere to the judgment of the Court below upon both points.

Attorney for plaintiff: *John Berridge.* Judgment affirmed.

Attorneys for defendant: *Blachford & Riches.*

In most, if not all, the states the recovery of a judgment against one of several wrong doers, without satisfaction thereof, would not bar a suit against another of such wrong doers. (*Dexter v. Broat*, 16 Barb., 337; *Wies v. Fanning*, 9 How. Prac., 546; *Livingston v. Bishop*, 1 Johns, 290; *Kasser v. People*, 44 Barb., 347). And even then it is no bar if the cause of action were such, in its nature, that it could legally exist against only one person, and that person be the defendant in the second suit. (*Matthews v. Lawrence*, 1 Denio., 213). And so a recovery against a firm for goods sold is no bar to an action against one of them for fraud. (*Morgan v. Skidmore*, 55 Barb., 263, affirmed in court of Appeals Nov. 1870, 2 Albany Law Jour., 437). If one of several wrong doers pay part of the damages, with or without suit, such payment in a suit against another of them may be deducted from the damages proved. (*Merchant's Bank*

v. Curtis, 37 Barb., 317), unless it were received in full satisfaction of the injury, and the party paying were released when it would be a flat bar for a release of one joint wrong doer is a satisfaction as to all. (3 Clitty's Pl., 106 a, 1 Pars. on Cont., 5th ed., 27; *Ovington v. Crocker*, 4 Abb. N. S., 335). If judgment be recovered against one of several wrong doers and he be imprisoned on execution, and discharged by consent of the creditor, it is a satisfaction as to all. (*Kasser v. People*, 44 Barb., 347). In an action of trespass *quare clausum* when the taking of personal property is alleged by way of aggravation, a recovery and payment thereof vests the title to the personal property in the defendant. (*Smith v. Smith*, 50 N. H., 212). Since the above was written this subject has been discussed in the Albany Law Jour., vol. 7 p. 81; *Id.*, p. 68; where the reader will find the cases more fully collected.

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583] *HORNE and another v. THE MIDLAND RAILWAY COMPANY.

Law Reports, 7 Common Pleas, 583.

Measures of Damages for Breach of Contract — Common Carrier — Notice of special Circumstances.

The plaintiffs, who were under a contract to supply a quantity of military shoes to H. in London (for the use of the French army) at 4s. per pair, an unusually high price, to be delivered there by the 3d of February, 1871, sent the shoes to the defendants' station at K. in time to be delivered in the usual course in the evening of that day, when they would have been accepted and paid for by the consignee; and the station master had notice (which for the purpose of the case was assumed to be notice to the company) at the time that the plaintiffs were under a contract to deliver the shoes by the 3d, and that unless they were so

delivered they would be thrown on their hands, but no notice was given to the defendants that the contract with H. was, owing to very exceptional circumstances, not an ordinary contract.

The shoes not arriving in London until the 4th, H. rejected them, and the plaintiffs were ultimately obliged to sell them at a loss of 1s 3d. per pair, 2s. 9d. per pair being the ordinary market value.

In an action against the defendants for their breach of contract, they paid into Court a sum sufficient to cover any ordinary loss occasioned by the delayed delivery; but the plaintiffs further claimed 267l. 3s. 9d., the difference between the price at which they had contracted to sell the shoes to H. and the price which they ultimately fetched:

Held, that they were not entitled to recover the latter sum, the damage not being the natural consequences of the defendants' failure to perform their contract, and the defendants not having had notice that the sale to H. was at an exceptional price. -

A VERDICT was taken for the plaintiffs for 283l. 7s. 9d., subject to the opinion of the Court upon the following case:

1. The plaintiffs are wholesale boot and shoe manufacturers at Kettering, in Northamptonshire.

2. In January and February, 1871, the plaintiffs were under a contract with Messrs. Hickson & Sons, of West Smithfield, to supply them with 20,000 pairs of military shoes, at 4s. per pair. The last day for delivery was the 3d of February, 1871; and all that were not so delivered would be thrown on the plaintiffs' hands.

3. The plaintiffs from time to time during the month of January delivered to Hickson & Sons, under their contract, shoes amounting in the aggregate to many thousands of pairs; and these were accepted by Hickson & Sons; but 4595 pairs which were *delivered by the plaintiffs to the defendants at Kettering, [584] consigned to Hickson & Sons in London, and were not tendered by the defendants to Hickson & Sons till the 4th of February, were rejected by Hickson & Sons, and thrown on the plaintiffs' hands, and were sold by them at a loss.

4. This action was brought to recover damages from the defendants for the loss so sustained by the plaintiffs. The defendants paid 20l. into Court.

5. The 4595 pairs of shoes (hereinafter called "the goods") were delivered to the defendants at Kettering, consigned to Hickson & Sons, in time to have been delivered in London to the consignees in the evening of February the 3d, when they would have been accepted by the consignees; but they were not tendered by the defendants to the consignees till the morning of the 4th, when the consignees refused them.

6. Notice was given by the plaintiffs to the defendants' station master at Kettering, at the time when the goods were delivered to him, that the plaintiffs were under a contract to deliver by the evening of the 3d of February; and it was to be taken, for the purposes of this case, that notice was at the same

time given by the plaintiffs to the defendants, through their station master, that the goods would be thrown upon the plaintiffs' hands if they were not so delivered by the said 3d of February.

7. The goods, if received on the 3d of February, would have been paid for by the consignees at the rate of 4s. per pair.

8. After the refusal of the consignees to accept the goods, the plaintiffs used their utmost endeavors to sell them at a good price, but could only get 2s. 9d. per pair for them, at which price they sold them.

9. The goods were in fact required by Hickson & Sons for a contract with a French house for supply to the French army; but, except as aforesaid, no notice of this fact, nor any information as to the extent or probable extent of damage in case of a breach of contract by the plaintiffs, was given to the defendants.

10. In consequence of the cessation of the war between France and Prussia, Hickson & Sons, except for the circumstances that they had the contract in question with the French house, could not have sold the goods at any better price than that actually 585] *obtained, if they had received them on the evening of the 3d of February instead of the morning of the 4th.

11. The plaintiffs claim to recover from the defendants as damages in this action the difference between 4s. per pair, the contract price, and 2s. 9d., the price of actual sale. The defendants dispute that this is the proper measure of damages, and say that the plaintiffs are not entitled to recover damages in this action in respect of the loss sustained by reason of the goods having been sold at 2s. 9d. per pair instead of at the contract price of 4s. per pair.

12. It was agreed that the court should be at liberty to draw any inference or to find any facts which in the opinion of the court a jury ought to have drawn or found.

If the plaintiffs were entitled to the difference between the contract price and the price of actual sale, the damages were 267*l.* 3*s.* 9*d.* above the amount paid into court. If they were not entitled to damages in respect of the price of actual sale, the 20*l.* paid into court was sufficient to cover the incidental expenses of sale and delivery to the ultimate purchaser, of attempts at re-sale, and any ordinary or general damages to which they were entitled. But, if the court laid down any principle for assessing damages under which the plaintiffs might conceive that they were entitled to more than 20*l.*, then the damages were to be referred.

Lumley Smith (*Field*, Q.C., with him), for the plaintiffs. The proper measure of damages under the circumstances of this case is, the loss which the plaintiffs have sustained through the de-

defendant's breach of contract, and that is, the difference between the price for which they had contracted for the sale of the shoes to Hickson & Sons, and which the latter would have paid if the shoes had been delivered on the 3d of February, and the price at which they were ultimately sold. The goods were delivered at the station in due time, and the station master was informed that, unless they were delivered to the consignees on the 3d of February, they would be thrown upon the plaintiff's hands. But for that notice (which is admitted to be notice to the company), the measure of damages would have been the difference in the market value. That notice, however, brings the case within the rule in *Hadley v. Baxendale* *⁽¹⁾, where Alder- [586 son, B., in delivering the judgment of the court, says ⁽²⁾: "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it." And he goes on to say that, "if the special circumstances under which the contract was actually made were communicated by the plaintiff to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated." That is precisely this case; for, when the contract was entered into, it must have been contemplated by both parties that a failure to deliver the shoes on the 3d of February would result in the loss which the plaintiffs have sustained. That rule was acted upon in *Cory v. Thames Ironworks Co.* ⁽³⁾, where Blackburn, J., says: "The damages are to be what would be the natural consequences of a breach under circumstances which both parties are aware of." And this distinguishes the cases of *Wilson v. Lancashire and Yorkshire Ry. Co.* ⁽⁴⁾, and *British Columbia Saw Mill Co. v. Nettleship* ⁽⁵⁾, from the present case. But, in the former of those cases, Willes, J., says ⁽⁶⁾: "The damage in respect of the goods being depreciated in value in consequence of their arrival at a time when they were less in demand and less capable of being applied usefully by the plaintiff, is the or-

⁽¹⁾ 9 Ex., 341; 23 L. J. (Ex.), 179.

⁽²⁾ 9 C. B. (N.S.), 632; 30 L. J. (C.P.),

⁽³⁾ 9 Ex. at p. 354.

232.

⁽⁴⁾ Law Rep., 3 Q. B., 181. at p. 186.

⁽⁵⁾ Law Rep., 3 C. P., 490.

⁽⁶⁾ 6 C. B. (N.S.), at p. 644.

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dinary, natural, and immediate consequence of the delay, for which the carrier is answerable." In *Collard v. South Eastern Ry. Co.* ⁽¹⁾, the defendants had no notice that the goods were sent for sale; but Martin, B., said ⁽²⁾: "It was proved that if 587] they had been *brought to market on the proper day they would have fetched a certain price, but, not being brought until a later day, the market price in the meantime fell, and the value of the hops was diminished by the amount of 65*l.* If that be not a direct, immediate, and necessary consequence of the defendants' breach of duty, it is difficult to understand what would be." In *Borries v. Hutchinson* ⁽³⁾ the plaintiffs were allowed to recover the loss of profit on the sale of the goods.

[WILLES, J. The true ground of the decision there was that there was no other market for the article.]

Suppose these goods had been altogether lost, what damages could the plaintiffs have recovered in trover? Clearly 4*s.* per pair. In *France v. Gaudet* ⁽⁴⁾, the plaintiff purchased champagne lying at the defendant's wharf at 14*s.* per dozen, and resold it at 24*s.* to the captain of a ship about to leave England. The defendant refused to deliver the wine, and the plaintiff was unable to fulfill his contract, champagne of a similar quality not being procurable in the market. The defendants had no knowledge of the sale, or of the purpose for which the plaintiff required delivery of the champagne. In an action for the conversion, it was held that the plaintiff was entitled, as damages, to the price at which he had sold the champagne, that being its actual value at the time of the conversion. There is nothing upon the face of the case to warrant an inference that the contract with Hickson & Sons was an exceptional one at the time it was made.

H. James, Q. C. (*Sturge* with him), for the defendants. In the absence of notice, the damages which the plaintiff would have been entitled to recover would have been covered by the amount paid into Court. The goods had sustained no deterioration or diminution of market value in consequence of the delay, as was the case in *Wilson v. Lancashire and Yorkshire Ry. Co.* ⁽⁵⁾. The plaintiffs must make out that such a notice was given to the defendants as bound them to indemnify the defendants for the loss which they claim. It was not enough to say that they had made a contract which required delivery by a given day: 588] the notice *should have informed the defendants of the very terms of the contract, seeing that it was for an exceptional price so far above the ordinary market value of the goods.

⁽¹⁾ 7 H. & N., 79; 30 L. J. (Ex.), 393. ⁽⁴⁾ Law Rep., 6 Q.B., 199.

⁽²⁾ 7 H. & N., at p. 86.

⁽³⁾ 18 C. B. (N.S.), 445; 34 L. J. (C.P.), 232. ⁽⁵⁾ 9 C. B. (N.S.), 632; 30 L. J. (C.P.), 169.

[WILLES, J. The case does not show whether or not the French house were absolved from their contract by the non-delivery of shoes to Hickson & Sons on the 3d of February; nor does it appear at what time the Franco-German war ceased.]

Nor when the contract with the French house was made. The true rule is that stated by Blackburn, J., in *Cory v. Thames Ironworks Co.* ⁽¹⁾: "The measure of damages when a party has not fulfilled his contract is what might be reasonably expected in the ordinary course of things to flow from the non-fulfilment of the contract; not more than that; but what might be reasonably expected to flow from the non-fulfilment of the contract in the ordinary state of things, and to be the natural consequences of it. The reason why the damages are confined to that is, I think, pretty obvious, viz., that if the damage were exceptional and unnatural damage, to be made liable for that would be hard upon the seller, because, if he had known what the consequence would be, he would probably have stipulated for more time, or, at all events, used greater exertions if he knew that extreme mischief would follow from the non-fulfilment of his contract." So, in *British Columbia Saw Mill Co. v. Nettleship*, Willes, J., says ⁽²⁾: "I am disposed to take the narrow view, that one of the contracting parties ought not to be allowed to obtain an advantage which he has not paid for. The conclusions at which we are invited to arrive would fix upon the ship-owner, beyond the value of the thing lost, and the freight, the further liability to account to the intended mill owners, in the event of a portion of the machinery not arriving at all or arriving too late through accident or his default, for the full profits they might have made by the use of the mill if the trade were successful and without a rival. If that had been presented to the mind of the ship-owner at the time of making the contract, as the basis upon which he was contracting, he would at once have rejected it." It is clear, therefore, that the only damage the defendants are liable for is, any diminution in the ordinary market value of the goods between the day on which they ought to have been [589 delivered in London and the day on which they were tendered to the consignees.

Lumley Smith, in reply. The defendants were entitled to notice of the kind of damage which would probably result from their breach of contract, but not of the quantum. It may be conceded that the mere fact of knowledge will not suffice; the defendant must have notice to fix him with the consequences of his breach of contract, where such consequences are of an unusual character. *Walker v. Jackson* ⁽³⁾, *Josling v. Irvine* ⁽⁴⁾, and *Gee v. Lancashire and Yorkshire Ry. Co.* ⁽⁵⁾, were also referred to.

⁽¹⁾ Law Rep., 3 Q. B., at p. 190.

⁽²⁾ 10 M. & W., 161.

⁽³⁾ Law Rep., 3 C. P., at p. 508.

⁽⁴⁾ 6 H. & N., 512; 30 L. J. (Ex.) 78.

⁽⁵⁾ 6 H. & N., 211; 30 L. J. (Ex.), 11.

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Horne v. Midland Railway Co.

WILLES, J. This case raises a very nice question upon the measure of damages to which a common carrier is liable for a breach of his contract to carry goods. It would seem that the damages which he is to pay for a late delivery should be the amount of the loss which in the ordinary course of things would result from his neglect. The ordinary consequence of the non-delivery of the goods here on the 3d of February would be that the consignee might reject them, and so they would be thrown upon the market generally, instead of going to the particular purchaser; and the measure of damages would ordinarily be in respect of the trouble to which the consignor would be put in disposing of them to another customer, and the difference between the value of the goods on the 3d and the amount realized by a reasonable sale. That *prima facie* would be the sum to be paid, in the absence of some notice to the carrier which would render him liable for something more special. These consequences would refer to the value of the goods at the time of their delivery to the carrier, the goods being consigned to an ordinary market and being goods in daily use and not subject to much fluctuation in price. In the present case, taking 2s. 9d. per pair as the value of the shoes, the ordinary damages would be the trouble the plaintiffs were put to in procuring some one to take them at that price, plus the difference, if any, in the market value between the 3d and the 4th of February. I find nothing in the case to show that there was any diminution in the value between those days. The plaintiffs' claim, therefore, in that respect would be covered by the 20*l.* paid into Court.

590] *But they claim to be entitled to 26*l.* 3s. 9d. over and above that sum, on the ground that these shoes had been sold by them at 4s. a pair to a consignee who required them for a contract with a French house for supply to the French army, which price he would have been bound to pay if the shoes had been delivered on the 3d of February. The special price which the consignee had agreed to pay was the consequence of the extraordinary demand arising from the wants of the French army; and the refusal of the consignee to accept the goods on the 4th was caused by the cessation of the demand for shoes of that character by reason of the war having come to an end. The market price, therefore, we must assume, to have been 2s. 9d. a pair when the shoes were delivered to the carriers; and the circumstance which caused the difference was that the plaintiffs had had the advantage of a contract at 4s. a pair before the extraordinary demand had ceased. Was that, then, an exceptional contract? It was not, I take it, at the time the contract was entered into; but it was at the time the shoes were delivered to the carriers. The plaintiffs sustained a loss of 1s. 3d. a pair on

the 4595 pairs of shoes which they failed to deliver in pursuance of their contract. It was, so to speak, a penalty thrown upon them by reason of the breach of contract. In that point of view, the contract was an exceptional one at the time the shoes were delivered to the carriers; and they ought to have been informed of the fact that by reason of special circumstances the sellers would, if the delivery had taken place in time, have been entitled to receive from the consignee a larger price for the shoes than they would have been entitled to in the ordinary course of trade. It must be remembered that we are dealing with the case of a common carrier, who is bound to accept the goods. It would be hard indeed if the law were to fix him with the further liability which is here sought to be imposed upon him, because he has received a notice which does not disclose the special and exceptional consequences which will or may result from a delayed delivery. I think the law in this respect has gone quite as far as good sense warrants. The cases as to the measure of damages for a tort do not apply to a case of contract. That was suggested in a case in *Bulstrode* ⁽¹⁾, but the notion was corrected *Hadley v. *Baxendale* ⁽²⁾. The damages are to be limited [591] to those that are the natural and ordinary consequences which may be supposed to have been in the contemplation of the parties at the time of making the contract. I go further. I adhere to what I said in *British Columbia Saw Mill Co. v. Nettleship* ⁽³⁾, viz. that "the knowledge must be brought home to the party sought to be charged, under such circumstances that he must know that the person he contracts with reasonably believes that he accepts the contract with the special condition attached to it." Was there any notice here that the defendants would be held accountable for the particular damages now claimed? In the ordinary course of things, the value of the shoes was 2s. 9d. a pair at the time they were delivered to the defendants to be carried. There was no change in their market value between the 3d of February and the 4th; and no notice to the carriers that the consignees had contracted to pay for them the exceptional price of 4s. a pair. The defendants had no notice of the penalty, so to speak, which a delay in the delivery would impose upon the plaintiffs. It would, as it seems to me, be an extraordinary result to arrive at, to hold that a mere notice to the carriers that the shoes would be thrown upon the hands of the consignors if they did not reach the consignees by the 3d of February, should fix them with so large a claim, by reason of facts which were existing in the minds of the consignors but were not communicated to the carriers at the time.

⁽¹⁾ *Everard v. Hopkins*, 2, Bul., 332.

⁽²⁾ 9 Ex., 341; 23 L. J. (Ex.), 179.

⁽³⁾ Law Rep., 3 C. P., 499, at p. 509.

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For these reasons I come to the conclusion that enough has been paid into Court to cover all the damages which the plaintiffs are entitled to recover, and that there must be judgment for the defendants.

KEATING, J. I am of the same opinion, upon the ground stated by my brother Willes, viz., that the damages claimed are the consequences not of that which could have been contemplated by the parties, but of an exceptional state of things. No doubt, a carrier who fails to deliver in due time goods entrusted to him is liable in damages for the ordinary and natural consequences of his breach of contract. But I think, giving the fullest effect 592] to *Hadley v. Baxendale* (¹), *and the rule there laid down, but which ought not to be extended, we cannot hold the defendants liable in respect of a loss resulting from an exceptional state of things which was not communicated to them at the time. There must, if it be sought to charge the carrier with consequences so onerous, be distinct evidence that he had notice of the facts and assented to accept the contract upon those terms. That evidence is not disclosed in this case.

Judgment for the defendants.

Attorneys for plaintiffs: *Sabbidge & Wrentmore.*

Attorneys for defendants: *Beale, Marigold, & Beale.*

(¹) 9 Ex., 341; 23 L. J. (C. P.), 170.

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*HENWOOD v. HARRISON.

[Law Reports, 7 Common Pleas, 606.]

Libel — Privilege — Fair Criticism on a Matter of "Public and national Importance."

The fair and honest discussion of or comments upon a matter of public interest is in point of law privileged, and is not the subject of an action, unless the plaintiff can establish malice.

The plaintiff, a naval architect, in 1867 submitted to the Admiralty proposals for the conversion of the old wooden line-of-battle ships of the Navy into iron-clad turret-ships. His proposals were considered by the admiralty, and rejected. In September, 1870, the iron-clad turret-ship *Captain* whilst on a cruise capsize and sunk with all hands. This disaster caused great excitement and anxiety in the public mind; and with a view to explain the circumstances under which the *Captain* had been sent to sea, as well as the general course pursued by the Board with reference to the placing the navy in a proper condition to meet the exigencies of modern naval warfare, a minute was prepared by the first Lord of the Admiralty for presentation to parliament during the approaching session. This minute referred to and criticised the plans of conversion proposed by the plaintiff; and in a note was inserted a letter upon the subject addressed to the Board in September, 1867, by Sir Spencer Robinson, then controller of the navy, which letter contained this passage — "These plans would have no weight whatever from the known antecedents of their author, but they derived weight from the approval of Mr. Watts, the late chief-constructor of the navy," and concluded by recommending their rejection. The minute was by order of the Lords of the Ad-

miralty printed by the defendant, the Queen's printer; and copies of it were publicly sold by him *before the meeting of parliament*.

At the trial of an action for this alleged libel, the judge, assuming the letter to be *prima facie* libellous, and it being conceded that the publication was without malice, nonsuited the plaintiff, on the ground that it was a fair criticism upon a matter of public and national importance, and therefore privileged.

Held, by Willes, Byles, and Brett, J.J., that the nonsuit was right.

Held, by Grove, J., that the publication was not privileged as being of public and national importance or interest, within the limits marked by previous decisions; and that it was not in the nature of a fair criticism of matter before the public, or, at all events, that it was not so clearly within the limits of such privilege as to be removed from the consideration of a jury.

The declaration stated that the plaintiff, before the committing by the defendant of the grievances thereafter mentioned, had made and submitted to the Lords of the Admiralty for their consideration certain proposals for converting wooden line-of-battle ships into sea-going turret-ships, and had also with the said proposals submitted to their Lordships certain plans showing how the said proposals were to be carried out; and that the defendant *falsely and maliciously published [607 of the plaintiff and of his said plans, in the appendix to a certain minute with reference to Her Majesty's ship *Captain*, a certain libel in the form of a letter or communication of Sir Spencer Robinson, controller of the navy, to the Board of Admiralty, containing, amongst other things, the false, scandalous, malicious, and defamatory matter following, that is to say, "These plans (meaning the said plans submitted by the plaintiff to the Lords of the Admiralty as aforesaid) would have no weight whatever from the known antecedents of their author (meaning the plaintiff, and meaning that the plaintiff's known antecedents were such as to make his plans of no value), but they derived weight from the approval of Mr. Watts, the late chief constructor of the navy. Your Lordships may, therefore, see fit to send a copy of this correspondence confidentially to that gentleman, in order that he may have the opportunity of offering to your Lordships any explanation which he may consider desirable in regard to it. To Mr. Henwood himself (meaning the plaintiff), I think it only necessary to say that your Lordships have had the whole question reconsidered, and are quite satisfied that no satisfactory conversion of the wooden line-of-battle ships can be made on his plan: and I beg leave to submit that he be so informed" (meaning thereby that the said plans so submitted by the plaintiff to the Lords of the Admiralty as aforesaid were worthless).

Plea, not guilty.

The cause was tried before Brett, J., at the sittings at Westminster after Trinity Term, 1871. The plaintiff, who described himself as a naval architect⁽¹⁾, had in the year 1867

⁽¹⁾ See the plaintiff's evidence stated more fully in the judgment delivered by Willes, J., post, p. 617.

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submitted to the Admiralty proposals for converting the old wooden line-of-battle ships of the British navy into iron clad turret ships, a scheme which seemed to have received some sanction from Admiral Halstead and Mr. Watts, formerly chief constructor of the navy. After some correspondence between the plaintiff and the Admiralty, and an attentive consideration of his suggestion that his plan should be tested by converting the *Duncan* or the *Gibraltar*, the plaintiff's proposals was rejected.

On the 6th of September, 1870, the iron clad turret ship 608] **Captain*, in consequence, as was surmised, of her faulty construction, capsized and sunk during a cruise, with all hands save one — her designer Captain Coles being on board. This great national calamity excited a feeling of intense anxiety in the public mind as to the safety of other vessels of a like description: and, with a view to allay that anxiety and to explain the circumstances under which the *Captain* was sent to sea, a minute was prepared by Mr. Childers, the first Lord of the Admiralty, explanatory of the course which had been pursued by the board with reference to the reconstruction of the navy, for the purpose of its being presented to parliament in the ensuing session. This minute made reference to and criticised the plan proposed by the plaintiff; and in a note was inserted the letter which was addressed to the board on the 2d of September, 1867, by Sir Spencer Robinson, the controller of the navy, which contained the alleged libel.

This minute was printed by the defendant, the Queen's printer, under the direction of the Lords of the Admiralty, and was by him publicly sold on the 30th of November, 1870, before the meeting of parliament.

It was admitted by the plaintiff that the publication by the defendant was without actual malice; but it was insisted that it was an unprivileged circulation of libellous matter, and therefore actionable. On the other hand it was contended that the letter was a fair criticism upon a matter of great national importance, and therefore privileged.

The learned judge nonsuited the plaintiff, on the ground that the publication was in the nature of a fair criticism of a proposal affecting a matter of great national importance, viz., the stability of the navy, and therefore, being *bonâ fide* and without malice, privileged. And he refused to leave to the jury, though strongly urged to do so, the question whether the letter was relevant to the occasion.

A rule nisi having been obtained for a new trial, on the ground of misdirection.

Huddleston, Q.C. (*The Attorney General* and *J. O. Griffiths* with him), showed cause. The circumstances under which and with

*reference to which the publication in question took place [609 were such as to repel the inference of malice, even if the matter contained in Sir Spencer Robinson's letter was of a libellous character. It was of paramount national importance that the public should be informed of the grounds upon which the Lords of the Admiralty acted in the rejection of a plan for the utilization of the old wooden line-of-battle ships. The question whether this constituted a privilege would have been concluded by the decision of the Court of Queen's Bench in *Wason v. Walter* (*), if the sale of this blue book had taken place after the minute had been presented to parliament; and the fact that it had been published a little too soon cannot destroy its privileged character. Malice is not to be inferred unless some evidence of it is given: *Harrison v. Bush* (†). And it is for the Court, and not for a jury, to say whether or not the defamatory matter is relevant to the privileged occasion: *Hodgson v. Scarlett* (‡).

H. Matthews, Q.C., and *Raymond*, in support of the rule. The letter of Sir Spencer Robinson was, no doubt, a privileged communication by him to the Board of Admiralty, as being a communication made by him in the course of his duty. And, even if the privilege extended to Mr. Childers—which may well be doubted, for there is no privilege known to the law in any minister or functionary of the crown, or even in the crown itself, to libel individuals—it clearly could not justify the defendant. Until he circulated the minute, there was nothing public. Since the case of *Stockdale v. Hansard* (†), it required an act of parliament to protect the publication of parliamentary papers (‡). *Wason v. Walter* (†), it is conceded, is no judicial decision upon this question: it was the case of a full and fair publication of a debate in parliament respecting the public conduct of the plaintiff, with fair comments thereon. That was privileged on the same ground that reports of proceedings in courts of justice are privileged: their publication is simply enlarging the area of the audience. That is an intelligible and safe ground upon which to rest the principle. It is said that the reasoning of the judgment in that case covers *the privilege contended for on [610 the part of the defendant. It may, however, be observed that the effect of the reasoning of the Lord Chief Justice is, that, as public opinion changes, the law changes with it, and it becomes the duty of the courts to keep the law up to the level of public opinion. That seems to be the fair and legitimate principle deducible from the propositions enunciated by his Lordship. Here, the plaintiff had not submitted his proposals to the public: he challenged no criticism. If a publication be privileged

(*) Law Rep., 4 Q. B., 73.

(‡) 5 E. & B., 344; 25 L. J. (Q.B.), 25.

(†) 1 B. & Ald., 282.

(†) 9 A. & E., 1.

(†) See 3 Vict. c., 9.

because it has reference to a matter of national importance, who is to decide as to the degree of importance? Is it the judge or the jury? If it be matter of fact, it must be for the jury; if of law, by what standard is the discretion of the judge to be measured? To constitute it privileged, the communication must be made in the performance of some legal or social duty or obligation, and the party addressed must have an interest in the subject matter. The cases as to this are too familiar to need citation. One instance may suffice, viz., that of a report made to the directors of a railway company as to the conduct of a secretary or other employé: *Harris v. Thompson*.⁽¹⁾ If this sort of privilege is to be allowed, where is it to stop? The appointment of a judge is matter of great public importance; so the conduct of a joint stock company; so the conduct of a member of parliament is of great public importance to his constituents: but, if any of these be impugned, are they to be at liberty to justify themselves by the publication of a series of libels? The rule which is here contended for was never suggested in *Stockdale v. Hansard* ⁽²⁾, though the defence in that case excited so much interest and was so elaborately considered. If there had been any foundation for it, Lord Truro could hardly have failed to urge it. It was for the jury to say whether or not the criticism was relevant to the occasion: *Bealson v. Skene*.⁽³⁾ The question of libel or no libel should have been left to them. *Cur. adv. vult.*

July 5. The Court not being unanimous, the following judgments were pronounced:

GROVE, J. I regret to have to differ from the rest of the Court. 611] *I have cross-examined myself to the best of my ability; and, as I cannot convince myself that I am wrong, I must yield to my own opinion.

It seems to me that the publication in question is capable of being considered libellous; that it is not privileged as being of public and national importance or interest, within the limits marked by previous decisions; and that it is not in the nature of a fair criticism of matter before the public, or, at all events, that it is not so clearly within the limits of such privilege as to be removed from the consideration of a jury.

As to the first point, it was not contended in argument, nor is it a ground of decision by the court, that the expressions complained of were incapable of being deemed libellous by a jury. It may be that, taking into consideration the whole publication, a jury might have fairly found a verdict for the defendant; but it appears to me to be a question for them whether the expres-

⁽¹⁾ 13 C. B., 333.

⁽²⁾ 9 A. & E., 1.

⁽³⁾ 5 H. & N., 838; 838; 29 L. J. (Ex.), 430.

sions contain such a reflection on the antecedents of the plaintiff, as to his skill or otherwise, as to constitute a libel.

Nearly the whole of the argument proceeded upon the second ground, viz., that the publication was privileged, as being *bona fide* and of public and national importance. In considering this, it is necessary to look to the circumstances under which the alleged libel was published. A minute dated the 30th of November, 1870, was prepared by the first Lord of the Admiralty relating to the loss of the ship *Captain*, for the purpose of being laid before parliament. To this was appended, *inter alia*, a *portion* of the correspondence relating to a proposal of the plaintiff to convert wooden line-of-battle ships into armor plated turret ships. A letter from Sir Spencer Robinson, controller of the navy, to the Board of Admiralty, forms part of this correspondence, and is the part complained of. I apprehend there is no doubt that this letter to the board is privileged: it is written by an official, on a subject within the scope of his authority, to the board, to which he owes a duty, and which has a corresponding duty, and is admittedly without malice. The question is, has another person, be it Mr. Harrison, the printer and seller, or the first Lord of the Admiralty, a further privilege to lay before the public this privileged communication?

In considering this question, we may assume the matter to be *libellous. Has, then, any subject of her majesty a right [612 to publish a libel communicated under privilege, if on a subject of national importance or public and general interest, if he do so *bona fide* and without malice? No case was cited in argument, and I am aware of none, according such a privilege. It would vest in the individual a most formidable power, and one likely to lead to the most injurious consequences.

Is, then, the judge who tries the case, subject to the revision of the court, to be the arbiter in each particular case as to whether the matter complained of is of such national importance and public interest as to be privileged? or is the judicial discretion of the court limited to such subjects as the law has defined as belonging in this respect to the public domain? and is this publication within such limits?

To carry the judicial discretion to the extent contended for would, I venture humbly to think, vest a new and unconstitutional power in the judges, would refer to their discretion a question of fact and degree incapable of being reduced to rule, and perilous to the proper discharge of their functions. If it exist in English law, a prime minister would have the right to publish opinions received by him as to the qualifications of a candidate or person proposed to fill a high office of state, communicated to him under circumstances of privilege; a lord chancellor to

publish opinions respecting a barrister proposed as a judge; a chairman of a corporation respecting a director or a secretary; an employer of labor to publish the character of a steward; or a master the character of a servant; provided each of these functionaries respectively acts bonâ fide, and the court considers the publication of national importance, which in degree all these matters may be and probably are.

I cannot help thinking that it would be a dangerous doctrine to propound, and one far more likely to be injurious than beneficial to the public, if such a view were sanctioned. It would prevent all that freedom of opinion and of intercourse which is necessary for supplying important offices with efficient men, and would lead to personal controversies of a character detrimental to the best interests of the commonwealth.

What is the criterion of decision which a judge would have in trying a case to place before himself in adjudicating upon such 613] *subjects? The only one that I can imagine is that argumentatively used by the Court in some of the reported cases, that the advantage to the community outweighs the injury to the individual. This is a most elastic formula, and, taking it alone, the privilege in any particular case could not be affirmed until the question in that case has been decided by the judgment of the House of Lords.

If it is conceded that this is not the law, then, are the proceedings of all the great departments of state, e. g. the Admiralty, the Board of Trade, the Home, Colonial, or Foreign Offices clothed with such immunity that they, their chairmen and public officers, or printers employed by them, can publish matter libellous in itself, if the publication is bonâ fide and without malice in the publisher? Here again, I can see no rule by which the limits are to be defined.

By the judgment in *Stockade v. Hansard* (¹), a document laid before the House of Commons, and printed and published by its order, was held not privileged; and an Act of Parliament (3 Vict. c. 9), as is well known, was passed to protect the publication of such proceedings.

It was argued in the present case that the loss of the *Captain* was a matter which had created great and general public interest. The foundering of the *Captain* was, no doubt, a public disaster; but so in degree is the wreck of a fishing boat. Where is the line to be drawn? The condition of the British navy is, no doubt, a matter of national importance and public interest; but so is in degree the condition and construction of vessels used in the coasting trade.

The privilege which the law gives to the correct publication

(¹) 9 A. & E., 1.

of proceedings in the Courts of law, and now, since the case of *Wason v. Waller* ⁽¹⁾, of debates in the House of Parliament, and to fair comments on them, is bounded by certain definite limits assumed to be marked out by the law. There, the individual is not the arbiter. He repeats, in fact, what is already matter belonging to the public; and the law fixes what subjects shall be so open to publication, and which are thenceforth open to comment. Nor is the judge the arbiter: the scope of the privilege is defined.

*The case of *Wason v. Waller* ⁽¹⁾, though the judgment [614 speaks of the advantage of publicity being given to proceedings of Courts of justice as being so great that the occasional inconvenience to individuals arising from it must yield to the public good, does not, as far as I can see, decide that, wherever that principle may be deemed by the Court to apply, the matter is privileged: it only decides that parliamentary debates, and fair comments on them, are privileged: and it assumes this to be the law, though not previously judicially decided. It relies much on the analogy between reports of proceedings in Courts of justice and of parliamentary proceedings: see pp. 89, 93, 94, of the report. If the doctrine contended for in this case be law, *Wason v. Waller* ⁽¹⁾ need not have been argued, or if argued, would have been so on different grounds. The decision there would be the minor premise of which the proposition here is the major; and the statute 3 Vict. c. 9, passed in consequence of the decision in *Stockdale v. Hunsard* ⁽²⁾, would have been unnecessary.

According to the argument on this head advanced for the defendant, a libel false in fact and most injurious to character would be privileged, if published bona fide and without malice, provided the judge and Court consider it of national importance or of public and general interest. No lines of demarcation were indicated by the learned counsel for the defendant, either as affording a guide in any particular case or as denoting what were the public departments privileged.

In the case of *Davison v. Duncan* ⁽³⁾, Lord Campbell says, referring to the publication of proceedings in Courts of justice: "The inconveniences which can arise from such a publication are infinitesimally small in comparison with the benefits which result from it. But as yet that privilege has not been extended to public meetings. There was an attempt made so to extend it, which failed; but before that time I never heard the doctrine now put forward contended for in a Court of justice; and it would carry the principle to an alarming extent, which ought

⁽¹⁾ Law Rep., 4 Q. B., 73.

⁽²⁾ 9 Ad. & E., 1.

⁽³⁾ 7 E. & B., 229; 28 L. J. (Q.B.), 104.

not to be permitted without considerable guards and limitations. If this plea be good, a fair and impartial account of what takes **615]** place at a *public meeting may be published, whatever harm it may do, from a county meeting to petition parliament down to a parish vestry meeting. At such meetings there may be a great number of things spoken, which are perfectly relevant, but highly injurious to the character of others; and, if a fair report of such proceedings is justifiable, in what condition would the injured party be, as he would have no opportunity of vindicating his character? We have no right to extend the privilege beyond what is already established. If the legislature should think it right to extend it to certain meetings, it might be very desirable; but that is not for us, sitting here, to consider." And Wightman, J., says ('): "Primâ facie, whoever publishes what is libellous is liable to an action, unless he can show that it is either true or that the publication is warranted by reason of its being a faithful report of a judicial or it may be of a parliamentary proceeding."

It is not contended that the matter here is privileged as a proceeding in parliament; for, it was not laid on the table of the House of Commons or published by its orders, but was published some time (I believe a month or two) before the meeting of parliament; and matter is not privileged because it is *intended* to be laid before parliament.

Secondly, is the publication of this letter in the nature of fair discussion or criticism on matter before the public, and of such a character that the judge can on this ground remove it from the jury? This question depends to some extent on the one which I have been considering. Assuming that the communications of the plaintiff to the Admiralty were not confidential, though this is not clear, this letter does not appear to me to be in the nature of a public discussion. It never need have been published at all. Portions of the correspondence are not published. The plaintiff, or those who agree with him, might have had no opportunity of discussing it; and, if they ultimately have, it is under great disadvantage, and after seriously injurious effects may have been produced. Here, moreover, it is the privileged reporter to the Board who is the critic, and not the publisher.

No doubt the communications of the plaintiff were not marked "private and confidential," and he seems to have published in **616]** some other form his plans for ships; but the proposals here were submitted to the consideration of the Board of Admiralty, and can hardly be said to be documents tendered to the public for general discussion. Whatever the plaintiff

(') 26 L. J. (Q.B.), at p. 107.

might have published elsewhere on the subject, it would have been but fair, before treating them as a subject of public criticism, to have informed him that they were to be so treated, and to have given him an opportunity of revising them. But, assuming the plaintiff's proposals were not confidential, and that, in submitting them to the Board, he had submitted them to the public, the letter of Sir Spencer Robinson was so; at least he seems so to regard it in the penultimate paragraph; and, if not privileged as being so far confidential that it is a communication addressed only to the Board to which he writes, this would only make him, if I am right, liable to an action for libel, as the publisher of it.

Then, can reflections on "the known antecedents of an author" be said by the Court to be in the nature of fair discussion or argumentative controversy? The reference to antecedents can hardly be taken to apply otherwise than to the man, and not to the proposals then made by him, as these would speak for themselves to an expert. Whether it be right to say that the observations on his antecedents are fair, upon a review of his antecedents, seems to me to be a question for the jury. Assuming all the other points against the plaintiff, is the Court which is to decide this question to say, this is public criticism of public matter, and this discussion is fair and is privileged; we, the judges, are of opinion that it is so, and remove it from the jury?

The freedom which is conceded to fair discussion and comment applies, as I understand it, to a discussion of matters duly before the public, a book submitted to public criticism; a proceeding in a law Court; debates in parliament; the public conduct of public functionaries, of soldiers in the field, &c. A report to a board is not of this nature. If it were, this consequence would follow, that, upon any plan submitted to a board, an official might make *bonâ fide* a report which is libellous and privileged; then, another official on the board might republish, also *bonâ fide*, this privileged but otherwise libellous communication, and a third person sell it for profit, and the person injured has no legal remedy. But, even *conceding all this, [617 is not a question for the jury whether the expressions were not what I may call *extra viam*, whether or not they exceeded the bounds of fair criticism, and were relevant? I cannot bring my mind to think that, in any view of the other questions, this one must not be for the jury.

It was in no wise admitted, but strenuously denied at the bar, that this publication was a fair comment. Indeed, for the counsel for the plaintiff to have admitted that it was, would have been to admit themselves out of Court on their strongest point. Whether the report was faithful and correct, and whether the

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comments were fair and reasonable, was a question left to the jury in *Wason v. Walter* ⁽¹⁾; and the Court of Exchequer, in *Beulson v. Skene* ⁽²⁾, considered that, where matters of fact were involved, the question of relevancy was for the jury.

Though fully impressed with the probability that I must be wrong in differing from opinions of so much weight, I feel compelled to say that in my judgment this rule should be made absolute.

WILLES, J. This was a rule to set aside a nonsuit, argued before my brothers Byles, Brett, and Grove, and myself. I proceed to deliver the judgment of the two former and myself.

The action was of libel, brought by the plaintiff, a naval architect, against the Queen's printer, for selling across the counter, in the regular course of business, a "blue book" ordered to be printed in the year 1870 by the Lords of the Admiralty, acting on behalf of Her Majesty, to be presented to parliament in explanation of the conduct of the board touching the reconstruction of the navy—a subject to which attention had just then been called by the disaster to Her Majesty's ship *Captain*. In that blue book was contained a criticism of a proposal sent in by the plaintiff on the 17th of April, 1867, to the admiralty, of what he described as, and what unquestionably was, a matter of national importance, namely, a mode of dealing with wooden ships to fit them by iron plating for the novel requirements of vessels of war, and further explained by a letter of the plaintiff of the 27th of July, 1867 (blue book 114), urging the importance of 618] the proposal, and *repeating his request that the proposal should be at once tested by converting the *Duncan* or *Gibraltar* according to his letter of the 17th of April. These proposals were from time to time submitted to the naval advisers of the admiralty for their consideration, and were objected to, and finally strongly disapproved of by Sir Spencer Robinson, the controller of the navy, in reports set forth in the blue book, and especially in the report in the blue book, pp. 116, 117, and containing, as it is insisted by the plaintiff, libellous strictures upon his experience and capacity to deal with this special subject of reconstruction.

This report contained a scientific criticism of the plaintiff's plan, and concluded with the following passage, upon which alone the charge of libel is founded: "These plans would have no weight whatever from the known antecedents of their author; but they derived weight from the approval of Mr. Watts, the late chief constructor of the navy. Their Lordships may, therefore, see fit to send a copy of the correspondence confidentially to that gentleman, in order that he may have an oppor-

(1) Law Rep., 4 Q. B., 73.

(2) 5 H. & N., 838; 29 L. J. (Ex.), 430.

tunity of offering to their Lordships any explanations which he may consider desirable with regard to it. To Mr. Henwood himself I think it is only necessary to say that their Lordships have had the whole question reconsidered, and are quite satisfied that no satisfactory conversion of the wooden line-of-battle ships can be made on his plan: and I beg leave to submit that he be so informed." Unless that passage be libellous, there is nothing objectionable in the report. The declaration complains of that passage only; and the innuendo is not of any personal attack upon the plaintiff's character, but simply "meaning that *the said plans* so submitted by the plaintiff to the Lords of the Admiralty as aforesaid *were worthless.*"

To determine the force and bearing of this alleged libel, it may be proper to consider the evidence of the plaintiff himself at the trial, giving an account of his qualifications and the circumstances which led to his proposal, in substance as follows: He was educated as a shipbuilder in the regular way, went to sea to acquire a practical knowledge of the subject, entered into the service of Messrs. Mare and Co., of Blackwall, whom he described as the largest ship builders in England, and who built ships for foreign countries, and remained in their employment for eight years, during which *he became their chief as- [619] sistant. He then became manager of the Hillwall Company, and so remained for five years; and there he had great experience in all classes of iron ships, and had built wooden gun boats. He was "concerned" there in building the *Northumberland*, the largest iron-clad. He did not design the ships which he was concerned in building. He designed the *Buroda*, of 2000 tons, for the Peninsular and Oriental Steam Ship Company. In 1865, he went into business on his own account as a merchant-ship builder, and built in that trade two or three barges. He had not built any ships himself since he set up in business; but he had superintended the building of two merchant steamers for the Roman government about 1867, for carrying stores and troops, not iron-clads. He had not superintended any others he had been so occupied in designing. He had not designed any ships that had been constructed. Soon after setting up as a merchant-ship builder, he started as a naval architect and consulting ship-builder, and had been consulted by agents of foreign countries, Portugal, Prussia, and Italy, who had become acquainted with him at Mare's, but did not build or design anything for them, nor was he paid for the consultations. He was consulted by Captain Coles and Admiral Halstead. He designed some iron-clad turret-ships for Captain Coles and Admiral Halstead, and was engaged on Admiral Halstead's designs for three years before the trial. In 1866, the idea came into his head of

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converting the wooden ships of the navy into iron-clad turret-ships, and he submitted his plans to Mr. Watts and Admiral Halstead, who approved of them, and advised their being submitted to Mr. Robert Napier, of Glasgow. In August or September, 1866, he inclosed a general sketch of his proposal to the Admiralty, who applied for further particulars, which were supplied; and, after a correspondence, the proposal was rejected in October, 1866. The plaintiff published his designs to others besides the Admiralty. His general proposal was inserted in the *Engineer* newspaper as a matter of national importance; and it was extensively commented upon by the press in all the daily papers. That discussion led the plaintiff in April, 1867, to renew his application to the Admiralty by a more specific proposal, and to request the Admiralty to try his system by converting Her Majesty's ship the *Duncan* or the *Gibraltar* upon his 620] *plan; whereupon the correspondence already mentioned took place, and the alleged libellous report was made. That correspondence ended in a formal rejection of the proposal in December, 1867. The designs were at the Paris Exhibition of 1867.

The proposal to the Admiralty, therefore, was made by a person who may have had considerable experience in shipbuilding, wooden and iron, but not on his own account; who had designed iron ships that had not been constructed, and had much considered iron-clads, but not been practically engaged in designing any that had been constructed and whose proposal was made upon a subject about which he may have thought a good deal but experimented little or nothing, and as to which it was fairly open to an honest critic without malice to say that the "anteecedents" of this gentleman, who is not either a practical builder or even a designer of the class of vessel in question, do not make his opinion upon this particular line of military marine architecture of weight, except so far as they derive it from the approval of those who have had practically to do with such work, like Mr. Watts, the former controller of the navy, and, in the words of the innuendo, that his "plans were worthless."

It was admitted at the trial, and upon the argument before this Court, that the defendant acted in fact *bonâ fide*, and without malice; and no suggestion was made or evidence given of malice against the plaintiff at the admiralty or elsewhere; but it was insisted on the part of the plaintiff that the occasion was not a privileged one, and that, in spite of his honesty and the absence of malice, the defendant was nevertheless liable, because the statement complained of was calculated, or might be thought by a jury to be calculated, to throw doubt upon the plaintiff's previous experience in the particular line of naval architecture upon which he assumed to give advice, which doubt (so far as

it is expressed) constitutes the whole sting of the expressions complained of in the controller's letter. And the plaintiff insisted that good faith and absence of malice, however they might affect the amount of damages, did not justify or excuse the *prima facie* libellous matter.

The learned Judge, Brett, J., however, nonsuited the plaintiff, *not* upon the ground that the defendant was the Queen's printer, **nor* that he had acted in the ordinary course of business, [621 *nor* that he had authority from a public department, *nor* upon the ground that the report was to be presented to parliament, and would at all events become public in a few days, all which palliations would, as was argued, have been insufficient; but upon the ground that every man has a right to discuss freely, so long as he does it honestly and without malice, any subject in which the public are generally interested, to state his own views and to advance those of others for the consideration of all or any of those who have a common interest in the subject; and that, whilst he does so, he has a privilege attaching to such right of free discussion, of the same character which has been held to attach in numerous instances in which liberty of speech has been allowed upon grounds of public and social convenience, where the speaker or writer and the person or persons addressed have had a duty or interest in common, the existence of which is held to rebut the inference of malice.

Of this class are cases of characters given to servants, either in dismissing them, *Taylor v. Hawkins* ⁽¹⁾; *Somerville v. Hawkins* ⁽²⁾; *Manby v. Witt* ⁽³⁾; or in advising others not to employ them, even though the advice be not asked for, *Pattison v. Jones* ⁽⁴⁾, per Bayley, J.; *Gardner v. Slade* ⁽⁵⁾; of advice given to another, as to the character of a person with whom marriage was contemplated, *Todd v. Hawkins* ⁽⁶⁾, per Alderson, B.; of information that a robbery had taken place, *Kine v. Sewell* ⁽⁷⁾; of a handbill offering a reward for the recovery of bills of exchange, stating that they were suspected of being embezzled by the plaintiff, such handbill being published for the protection of the person liable on the bills, or to secure the conviction of the offender, *Finden v. Westlake* ⁽⁸⁾; of complaints to public officers of the conduct of persons in their employment, *Blake v. Pilfold* ⁽⁹⁾; *Woodward v. Lander* ⁽¹⁰⁾; of fair criticisms of literary or other **works*, *Tubart v. Tipper* ⁽¹¹⁾, *Fryer v. Kimnersley* ⁽¹²⁾, of [622

⁽¹⁾ 16 Q.B., 308; 20 L.J. (Q.B.), 313.

⁽²⁾ 10 C. B., 583; 20 L. J. (C. P.), 131.

⁽³⁾ 18 C. B., 544; 25 L. J. (C. P.), 294.

⁽⁴⁾ 8 B. & C., 678.

⁽⁵⁾ 13 Q.B., 756; 18 L.J. (Q.B.), 234.

⁽⁶⁾ 8 C. & P., 88.

⁽⁷⁾ 3 M. & W., 207.

⁽⁸⁾ M. & M., 461, per Tindal, C.J.

⁽⁹⁾ 1 M. & Rob., 198, per Taunton, J.

⁽¹⁰⁾ 6 C. & P., 548, per Alderson, B.

⁽¹¹⁾ 1 Camp., 350, per Lord Ellenborough.

⁽¹²⁾ 15 C. B. (N.S.), 332; 33 L. J. (C.P.) 96.

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places of public resort, *Dibdin v. Swan* ⁽¹⁾, or of the persons who perform there, *Gregory v. Duke of Brunswick* ⁽²⁾, or of other proceedings of a character in which the public have an interest, *Dunne v. Anderson* ⁽³⁾.

The principle upon which these cases are founded is a universal one, that the public convenience is to be preferred to private interests, and that communications which the interests of society require to be unfettered may freely be made by persons acting honestly without actual malice, notwithstanding that they involve relevant comments condemnatory of individuals. In *Too good v. Spyring* ⁽⁴⁾, Parke, B., stated the law as follows: "In general, an action lies for the malicious publication of statements which are false in fact and injurious to the character of another (within the well known limits as to verbal slander); and the law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs in matters where his interest is concerned. In such cases, the occasion prevents the inference of malice which the law draws from unauthorized communications, and affords a qualified defence depending upon the absence of actual malice. If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common protection and welfare of society; and the law has not restricted the right to make them within any narrow limits." In *Harrison v. Bush* ⁽⁵⁾, where an elector of Frome petitioned the Home Secretary, stating that the plaintiff, a magistrate of the borough, had made speeches inciting to a breach of the peace, and praying an inquiry and that the Home Secretary should advise her Majesty to remove the plaintiff from the commission of the peace, such petition was held to be privileged; and Lord Campbell, expressing the opinion of the Court of Queen's Bench, stated [623] the rule to be that "a communication made *bonâ fide* upon any subject matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it contain criminatory matter which without this privilege would be slanderous and actionable." In the present case, little need be said to show that the communicator had both an interest and a duty in the subject matter. And, he added, that duty "cannot be confined to legal duties which may be enforced by indictment, action, or mandamus, but must include moral and social duties of imperfect obligation." And in *Whitley v. Adams* ⁽⁶⁾, in this Court, Erle, C.J., Williams, J., Keating,

⁽¹⁾ 1 Esp., 28, per Lord Kenyon.

⁽⁴⁾ 1 C. M. & R., 181.

⁽²⁾ 1 Car. & K., 24, per Tindal, C.J.

⁽⁵⁾ 5 E. & B., 344; 25 L.J. (Q.B.), 25.

⁽³⁾ R. & M., 287; 3 Bing., 88, per Best, C.J.

⁽⁶⁾ 15 C. B. (N.S.), 392; 33 L.J. (C.P.), 89.

J., and Byles, J., acted upon the rule in the terms that "a communication made *bonâ fide* upon any subject matter in which the party communicating has an interest, or in reference to which he has, or honestly believes he has, a duty, is privileged, if made to a person having a corresponding interest or duty, although it contains criminary matter which without this interest would be slanderous or actionable."

It is clear that the privilege so established in respect of duty or interest, however necessary and valuable, must be exercised within the limits which the interest or duty indicates, and that, in many of the instances of privilege to which reference has been made, a public statement to an individual not having any interest in the matter might be held libellous. The statement must be such as the occasion warrants, and made to a person who is interested in receiving it. The mere fact of the presence of a person uninterested has been held to be insufficient to take away the privilege, as in many of the cases as to master and servant; but the statement to a person wholly uninterested would in such case be defamatory, as, for instance, in the case of a joint stock company, the publication of a defamatory report of the auditors of the company to the shareholders, whom alone it interested, might be privileged, whilst its general publication might be libellous: *Lawless v. Anglo-Egyptian Cotton and Oil Co.* (1) In others of the cases referred to, the publication has been held to be privileged, though made in the form of a handbill, or a statement in a newspaper, *where the subject [624 was one in which the public had an interest; and this was remarkably the case in *Wason v. Waller* (2), where the subject received the most elaborate and satisfactory consideration. In that case, the *Times* newspaper published a debate in the House of Lords touching a petition presented by the plaintiff to the House, charging an eminent judge with misconduct; in the course of which debate the Lord Chancellor commented upon the plaintiff's conduct as false, cowardly, and malicious. The *Times* also published a leading article, in which the conduct of the plaintiff was severely discussed, and characterized as false and malicious. The Lord Chief Justice Cockburn held that the publication of the debate, if honest, *bonâ fide*, and truthful, was justifiable and not the subject of a civil action, upon the same or even stronger grounds than those which justify the publication of proceedings in a Court of justice. As to the leading article, which, so to speak, was a statement to the whole world, the Lord Chief Justice held that the occasion was privileged, in the absence of malice; and left it to the jury, in effect, to say whether the article was one which could be ascribed to mali-

(1) Law Rep., 4 Q. B., 262.

(2) Law Rep., 4 Q. B., 73.

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cious and sinister motives, or only a fair comment. The Court affirmed the ruling of the Lord Chief Justice upon both points; and upon the latter, as to the publication of the leading article, which, it may be observed, stood in no better or worse position in point of law than a letter addressed or a book sold by one member of the public to another or other members of the public, containing the same language, the judgment was as follows: "We are of opinion that the direction given to the jury was perfectly correct. The publication of the debate having been justifiable, the jury were properly told that the subject was, for the reasons we have already adverted to, pre-eminently one of public interest" (affecting, as it did, the conduct of one of the public servants of the state, which had been brought by the plaintiff under the notice of parliament), "and therefore one on which public comments and observations might properly be made, and that consequently *the occasion was privileged, in the absence of malice*. As to the latter, the jury were told that they must be satisfied that the article was an honest and fair comment on the facts; in other words, that, in the first place, they must be 625] satisfied that the *comments had been made in an honest belief in their justice, but that this was not enough, inasmuch as such belief might originate in the blindness of party zeal, or personal and political aversion; that a person taking upon himself publicly to criticise the conduct or motives of another, must bring to the test, not only an honest sense of justice, but also a reasonable degree of judgment and moderation, so that the result may be what a *jury should deem*, under the circumstances of the case, *a fair and legitimate criticism on the conduct and motives of the party* who is the object of censure."

That decision necessarily involves the conclusion that the fair and honest discussion of or comments upon a matter of public interest is in point of law privileged, and that it is not the subject of an action, unless the plaintiff can establish malice.

The case of *Stockdale v. Hansard* (¹), so much relied upon in the argument in this Court to show that no privilege existed in respect of the discussion of public questions, was thus distinguished in the judgment in *Wason v. Walter* (²): "The position that the order of the house of Commons cannot render lawful what is contrary to law, still less that a resolution of the house can supersede the jurisdiction of a Court of law, under the garb of privilege, can have no application where the question is, not whether the act complained of, being unlawful at law, is rendered lawful by the order of the house, or protected by the assertion of its privilege, but is, independently of such order or assertion of privilege, in itself privileged and lawful." This is

(¹) 9 A. & E., 1.

(²) Law Rep., 4 Q. B., at p. 87.

obvious when it is considered that, in *Stockdale v. Hansard* ⁽¹⁾, the question arose upon demurrer, so that the plaintiff was entitled upon the argument to assume that if the case went to trial he could give evidence of actual malice, and the defence set up was an absolute justification, not a privilege, in the absence of actual malice. In *Stockdale v. Hansard* ⁽¹⁾ the defendant claimed under the authority of one House of Parliament the same absolute exemption from suit which by the general law of the land, upon grounds of public policy, protects a witness or person making an affidavit in the course of an action, or a person speaking or writing in the course of a judicial proceeding, civil or military, from liability even in respect of statements wilfully false and malicious: *Revis v. Smith* ⁽²⁾; *Henderson v. Broomhead* ⁽³⁾; *Dawkins v. Lord F. Poulet* ⁽⁴⁾; *Dawkins v. Lord Rokeley* ⁽⁵⁾.

The defendant in this case, like the defendant in *Wason v. Walter* ⁽⁶⁾, claims no such absolute exemption, but only the privilege of every subject of the realm, to discuss matters of public interest honestly and without actual malice.

The judgment in *Wason v. Walter* ⁽⁶⁾ further recognized the doctrine that the effect of a privileged occasion, the existence of which it is for the judge to determine as matter of law, rebuts the legal inference of malice, and that the plaintiff must fail unless he can prove malice in fact. "In the English law of libel ⁽⁷⁾, malice is said to be the gist of an action for defamation. And, though it is true that by malice, as necessary to give a cause of action in respect of a defamatory statement, legal and not actual malice is meant, by which legal malice, as explained by Bayley, J., in *Bromage v. Prosser* ⁽⁸⁾, is meant no more than the wrongful intention which the law always presumes as accompanying a wrongful act, without any proof of malice in fact; yet the presumption of law may be rebutted by the circumstances under which the defamatory matter has been uttered or published; and if this should be the case, though the character of the party concerned may have suffered, no right of action will arise. 'The rule,' says Lord Campbell, in the case of *Taylor v. Hawkins* ⁽⁹⁾, is, that, if the occasion be such as repels the presumption of malice, the communication is privileged, and the plaintiff must then, if he can, give evidence of (actual) malice.'"

Where privilege exists, the burthen of proof of actual malice rests upon the person who complains. If there is no evidence

⁽¹⁾ 9 A. & E., 1.

⁽²⁾ 18 C. B., 126; 35 L. J. (C.P.), 195.

⁽³⁾ 4 H. & N., 569; 28 L. J. (Ex.), 360.

⁽⁴⁾ Law Rep., 5 Q. B., 94.

⁽⁵⁾ Cam. Scac. H. Vac., 1872.

⁽⁶⁾ Law Rep., 4 Q. B., 73.

⁽⁷⁾ Law Rep., 4 Q. B., at p. 87.

⁽⁸⁾ 4 B. & C., 255.

⁽⁹⁾ 16 Q. B., at p. 321.

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of such malice, it is the duty of the judge to direct a nonsuit or a verdict for the defendant: *Somerville v. Hawkins* ⁽¹⁾; *Spill v. Maule* ⁽²⁾.

In the present case, there was no suggestion and no evidence of malice in any one. The honesty of the publication and the absence of malice were admitted; and there was nothing to be [627] decided *except the question of law, whether *the occasion was privileged*. The learned judge ruled that it was.

In substance, the defendant communicated to another member of the public a statement of the Lords of the Admiralty and the public officers under their control, accounting for their proceedings as to the reconstruction of the navy. This statement was made by public servants intrusted by the crown with the charge of the most important defence of the country, in which every subject of the Queen had an interest of the deepest character; and the statement would have been garbled and incomplete, unless it set forth the very discussion which the plaintiff's own suggestions naturally and necessarily challenged and provoked. It is vainly suggested that those proposals of the plaintiff were private and confidential. There was no stipulation that they should be so considered. They were, moreover, simultaneously published by the plaintiff, and exposed to honest criticism at home and abroad. The plaintiff's proposal was made upon a subject of public interest, to agents of the crown, who were bound to consider and criticise what was put forward by the plaintiff, if they thought it of sufficient importance to be discussed, which, as against him, it must be taken to have been; and, in the course of that criticism and discussion, the merits of his plans and the previous experience and judgment of the suggester on the subject with which he dealt were relevant subjects of remark. The occasion, therefore, was one in which the alleged libeller and every member of society to whom he might issue the blue book had in common with the plaintiff an interest incomparably greater than that which in so many cases has been held to carry a privilege essential to freedom, and which, in the absence of malice, is answer to the action.

To prevent any misconstruction of this judgment, it may be proper to say that we agree with the learned judge in attributing no legal weight to the high authority under which the publication took place, nor to the particular object for which the documents were printed, and to add that the jury in civil cases, equally as in criminal cases, are the proper tribunal to determine the question of libel or no libel. This was affirmed by the declaratory act of 1792, (32 Geo. 23 c. 68), and has been often recognized:

⁽¹⁾ 10 C. B., 588; 20 L. J. (C.P.), 131.

⁽²⁾ Law Rep., 4 Ex., 232.

see per *Lord Wensleydale, in *Parmiler v. Coupland* (1). But [628 it is not competent for the jury to find this, upon a privileged occasion, relevant remarks made bonâ fide without malice are libellous. As Lord Wensleydale said in the same case (2), "Every subject has a right to comment on the acts of public men which concern him as a subject of the realm, if he do not make his commentary a cloak for malice or slander." It would be abolishing the law of privileged discussion, and deserting the duty of the Court to decide upon this as upon any other question of law, if we were to hand over the decision of privilege or no privilege to the jury. A jury, according to their individual views of religion or policy might hold the church, the army, the navy, parliament itself to be of no national or general importance, or the liberty of the press to be of no less consequence than the feelings of a thin skinned disputant.

In actions of libel, as in other cases where questions of fact, when they arise, are to be decided by the jury, it is for the Court first to determine whether there is any evidence upon which a rational verdict for the affirmant can be founded.

The whole argument to prove that the case ought to have been left to the jury was based upon the primâ facie case of words printed, which a jury might find to be disparaging of the plaintiff in stating that his "plans were worthless." The answer is, that the privileged occasion shifts the burthen, and that, in respect of relevant words, though defamatory, the plaintiff cannot recover without proving malice, which he has failed to do.

If the case has been left to the jury, and they had found for the plaintiff, it would have been the duty of the Court to set aside that verdict.

In this judgment my brother Byles and Brett concur. We are of opinion that the learned judge was right in nonsuiting the plaintiff, and that the rule to set aside the nonsuit ought to be discharged.

Rule discharged.

Attorneys for plaintiff: *Wilkinson & Son.*

Attorney for defendant: *A. J. Bristowe.*

(1) 6 M. & W., 105.

(2) 6 M. & W., at p. 108.

June 5, 1872.

*STANTON v. AUSTIN and others.

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[Law Reports, 7 Common Pleas, 651.]

Shipping — Construction of Charterparty — Notice of Ship's Arrival at a particular Dock, and Readiness to receive Cargo.

In an action by a ship owner against the charterers for not loading a cargo of coals pursuant to a charterparty by the terms of which the owner engaged that the vessel, then in the port of Sunderland, being tight, &c., should with all possi-

ble dispatch proceed direct to the South Dock, Sunderland, and there load, in the usual and customary manner, at any one of the collieries the freighters might name, a full cargo of coals, &c., which the freighters bound themselves to ship by a given day, for Calcutta. the defendants pleaded that they had not any notice of the ship having proceeded to and having arrived at the South Dock, and of her being ready to receive cargo, wherefore they did not nor could load :

Held, that the allegation in the plea must be treated as an allegation of fact, meaning that by reason of want of notice of the ship's arrival at the dock and being ready to load, the defendants were prevented loading her ; and that, so read the plea was an answer to the action.

THE declaration stated that it was agreed by and between the plaintiff and the defendants that the plaintiff's vessel *Kingsbridge*, then in the port of Sunderland, should with all possible dispatch sail and proceed to the South Dock, Sunderland, and there load a full and complete cargo of coals and coke, say, not less than 1600 tons of coal and 600 tons of coke, and, being so loaded, proceed to Calcutta, via the Cape of Good Hope, and there deliver the same for freight payable by the defendants to the plaintiff in that behalf ; that by the said charterparty it was amongst other things further agreed as follows, that is to say " the charterers guaranty that the ship shall be loaded by the 15th of December, provided she is ready to receive cargo by the 6th of that month : Averment that the vessel sailed and proceeded to the South Dock, Sunderland, aforesaid, and was ready to receive cargo by the 6th of December, and that all conditions were performed and things were done and happened and times elapsed necessary to entitle the plaintiff to have his vessel loaded by the 15th of December by the defendants, and to sue them for the breach thereafter mentioned : Breach, that the defendants did not load the said vessel by the said 15th of December, nor until a long time afterwards, that is to say, the 21st of December, whereby the plaintiff's vessel was detained at great expense and [652] cost to the plaintiff, that is to say, the cost of *maintaining the crew of the said vessel, and certain dock and other charges which the plaintiff thereby had to pay ; and the plaintiff was otherwise damnified by reason of the said detention.

Second count, that, in consideration that a certain ship of the plaintiff's called the *Kingsbridge*, then in the port of Sunderland should with all possible dispatch proceed direct to the South Dock, Sunderland, and there load in the usual and customary manner a full and complete cargo of coals in accordance with a certain charterparty made and entered into by and between the plaintiff and the defendants, the defendants promised the plaintiff, amongst other things, that they would load the said cargo within a reasonable time after the ship should have arrived at the South Dock, and should be ready to receive the cargo : Averment, that the ship did proceed to the South Dock, and all conditions were performed, &c., to entitle the plaintiff to have

the defendants load the cargo within a reasonable time as aforesaid, and to sue the defendants for the breach thereinafter mentioned: Breach, that the defendants did not load the cargo within a reasonable time as aforesaid, but made great delay in so doing; whereby the plaintiff suffered damage as in the first count mentioned.

Third count, that it was agreed by charterparty by and between the plaintiff and the defendants as in the first count mentioned: Averment, that the ship was not ready to receive the cargo by the said 6th of December; and thereupon, in consideration that the plaintiff would receive the cargo on board the said vessel in accordance with the terms of the charterparty, except in so far as it was thereby provided, as hereinbefore mentioned, that the ship should be loaded by the 15th of December, the defendants promised the plaintiff, amongst other things, that they would load the cargo within a reasonable time: Averment and breach as in the second count.

Third plea, to the first count, that it was agreed in and by the charterparty that the ship, then in the port of Sunderland, being tight, strong, and then every way fitted and ready for the voyage, should with all possible despatch proceed direct to the South Dock, Sunderland, and there load in the usual and customary manner at any one of the collieries freighters might name, a full and complete cargo of coals and coke, which freighters bound *themselves to ship, and, being so loaded, should [653 therewith proceed to Calcutta, and deliver the cargo as in the charterparty provided (the act of God, &c., excepted); and that the defendants had not any notice of the ship having proceeded to and having arrived at the said South Dock, and of her being ready to receive cargo as in the charterparty mentioned; wherefore the defendants did not nor could load, as in the first count complained of.

The sixth and tenth pleas, to the second and third counts respectively, were similar to the third.

Demurrer, on the ground that absence of notice is not material. Joinder.

May 1, 1871. *Sir G. Honyman, Q.C.* (*Watkin Williams* with him), in support of the demurrers, contended that there was no obligation on the plaintiff to give notice to the defendants when the ship was ready to receive cargo; that it was their duty to watch for her; and that their undertaking to load within the time specified in the contract was absolute, and not subject to any condition as to notice. He cited *Harman v. Clarke* ⁽¹⁾; *Harman v. Mant* ⁽²⁾; *Reynolds v. Fenton* ⁽³⁾; Selwyn's *Nisi Prius*, 12th ed. 119, 13th ed. 133.

(1) 4 Camp., 159.

(2) 4 Camp., 161.

(3) 4 C. B., 197; 16 L. J., (C.P.), 15.

[BRETT, J., referred to *Erichsen v. Barkworth*.⁽¹⁾]

Baylis, contra, contended that, as the vessel was at the time of the execution of the charterparty lying in the port of Sunderland, and, being tight, &c., was to proceed to the South Dock, her going there, and in that state, was a matter which was solely within the control and knowledge of the plaintiff, the owner, and therefore notice of her arrival there and readiness to load ought to have been given to the defendants, the removal of the vessel from the place where she was then lying to the South Dock not being a matter of such public notoriety as that the charterers would be bound to take notice of it, as in the case of an arrival in a port. He cited *Vyse v. Wakefield* ⁽²⁾, where [654] the general rule as to when *notice is necessary is considered by Parke, B. ⁽³⁾; *Fairbridge v. Pace* ⁽⁴⁾; and *Makin v. Watkinson*. ⁽⁵⁾

Sir G. Honyman, Q.C., was heard in reply.

BOVILL, C.J. If the allegation in the pleas that, for want of notice of the ship's having proceeded to the South Dock and being there ready to receive cargo, the defendants were unable to load her, be taken to be an allegation of fact, which, as at present advised, we incline to think would alone make the pleas good, we think it would be more convenient that our judgment upon the demurrers should be deferred until after the trial of the issues of fact.

Cur. adv. vult.

The issues of fact were tried before Martin, B., at the Durham Summer Assizes, 1871, when a general verdict was found for the defendants. A new trial was moved for in Michaelmas Term last, but refused.

July 5. The judgment of the Court (Bovill, C.J., and Byles, Smith, and Brett, JJ.), upon the demurrers was delivered by

BOVILL, C.J. The demurrers in this case were argued before the Court in Easter Term, 1871, and judgment was reserved until after the issues in fact had been tried. That has now been done, and a verdict found for the defendants.

It was an action by the shipowner against the charterers for not loading a cargo of coal pursuant to charterparty; and by the terms of the charterparty, as stated in the declaration and the pleas, the vessel was to proceed to the South Dock, Sunderland, and there load in the usual and customary manner at any one of the collieries the freighters (the defendants) might name; and each of the pleas demurred to alleged that the defendants had not any notice of the ship having proceeded to and arrived

⁽¹⁾ 3 H. & N., 601; 27 L. J. (Ex.), 472:
In error, 3 H. & N., 894; 28 L. J., (Ex.), 95.

⁽²⁾ 6 M. & W., 442.

⁽³⁾ 6 M. & W., at p. 453.

⁽⁴⁾ 1 C. & K., 317.

⁽⁵⁾ Law Rep., 6 Ex., 25.

at the South Dock, and of her being ready to receive cargo, *wherefore the defendants did not nor could load her.*

When the case was argued upon the demurrers, we had no information *upon the pleadings as to the course of load- [655 ing at the South Dock, and a question arose whether the last allegation in the pleas was to be treated as a mere conclusion of law or as an allegation of matter of fact.

Assuming the pleas to be bad without such an allegation of fact, then, in order to support them, it would be necessary to treat the last averment as an allegation of fact, meaning that, without notice from the plaintiff, the defendants would not have fair means of knowing that the ship had arrived and was ready. And, as we should construe the averment in a sense which would support the pleas rather than defeat them, we think they must be considered to contain an allegation in substance that by reason of want of notice of the ship's arrival and being ready to load, the defendants were prevented loading her.

In that view of the case, we think the pleas are good, and our judgment upon the demurrers must be for the defendants.

Judgment for the defendants.

Attorneys for plaintiff: *Thomas & Hollams.*

Attorneys for defendants: *Torr, Janeway, Tugart, & Co.*

DETERMINED BY THE

COURT OF EXCHEQUER,

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF EXCHEQUER.

IN AND AFTER

TRINITY TERM, XXXV VICTORIA.

June 12, 1872.

*SMITH v. FLETCHER and others.

[Law Reports, 7 Exchequer, 305.]

Trespass — Duty of Owner of Land — Collecting Water.

One who for his own purposes so manages his land as to collect there in abnormal quantities anything likely to do mischief if it escapes, is, *prima facie*, answerable for the damage consequent upon its escape.

The defendants' mines adjoined and communicated with the plaintiff's, and in the surface of the defendants' land were certain hollows and openings, partly caused by and partly made to facilitate the defendants' workings. Across the surface of their land there ran a watercourse. In November, 1871, the banks of the watercourse (which were sufficient for all ordinary occasions) burst in consequence of exceptionally heavy rains, and the water escaped into and accumulated in the hollows and openings, where the rains had already caused an unusual amount of water to collect, and thence by fissures and cracks water passed into the defendants', and so into the plaintiff's mines. If the land had been in its natural condition the water would have spread itself over the surface, and have been innocuous. The defendants were not guilty of any actual negligence in the management of their mines. In an action by the plaintiff to recover the damage he had sustained:

Held, on the principle of *Fletcher v. Rylands* (Law Rep., 3 H. L., 330), that the defendants were liable, although they were not guilty of any personal negligence, and although the accident arose from exceptional causes.

DECLARATION. 1st count, that the defendants broke and entered a close of the plaintiff called Crossgill, and certain mines thereunder, and flooded them with water, whereby the plaintiff sustained damage, in the manner and to the extent specified in the count.

2d count: That at the time, &c., the plaintiff was possessed of certain land, and mines thereunder, and the defendants were possessed of certain other land and mines thereunder adjoining to and in communication with the plaintiff's mines, but on a higher level, so that the water introduced into the defendants' mines would by reason of the floor of those mines being impervious to water, and of the "dip" or inclination thereof necessarily run down and pass into the plaintiff's mines, as the defendants well knew; yet the defendants, for the purpose of

causing the water to flow and be removed from the surface of their land and from certain hollows in the same caused by former workings into which the water flowed and accumulated, wrongfully made certain holes or opening in the surface of their lands and in the hollows and thereby wrongfully introduced into their mines quantities of water, which water ran *down the [306 defendants' mines and so into the plaintiff's mines, and flooded them, whereby, &c.

3d count, similar to the second in its introductory averments, and alleging that the defendants wrongfully and negligently permitted certain holes, which had been made in the surface of their land down to and opening into their mines for the purpose of working the same, to remain open after the holes had ceased to be used for the working of the mines, and by means of these holes quantities of water collected and were introduced into the defendants' mines, and so into the plaintiff's and flooded the same, whereby, &c.

4th count, similar to the second in its introductory averments, and alleging that the defendants wrongfully and negligently diverted a watercourse flowing through their land without making a sufficient channel for it to flow in and sufficient banks to prevent it from flooding the adjacent lands, and that by reason of this wrongful and negligent conduct of the defendants the watercourse overflowed and burst its banks and flowed over the defendants' lands and into the holes thereon, and thence into the defendants' mines, and so into the plaintiff's and flooded the same, whereby, &c.

Pleas (inter alia): 1; Not guilty. 2. To 2d, 3d, and 4th counts, denial that the water introduced into the defendants' mines necessarily ran down and passed into the plaintiff's mines by reason of the floor of the defendants' mines being impervious, and of the "dip" or inclination thereof. 3. To same: Denial of defendants' knowledge of the things alleged to have been known by them.

Issue.

At the trial, before Lush, J., at the Cumberland Spring Assizes, 1872, the following facts were proved:

The plaintiff is lessee of iron ore mines in an estate called Crossgill, in the county of Cumberland, and the defendants are lessees of some other mines adjoining the plaintiff's called the Parkside and Gossegreen mines. The "dip" of the strata and deposit of iron ore in all these mines is such that the plaintiff's mines being below those of the defendants, the flow of water would naturally be from the defendants' towards the plaintiff's mines. In parts *of the surface of the defendants' land [307 are hollows caused by the subsidence of the ground over spots

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defendants not preventing, but by their causing it. I have no desire to quote my own judgment in *Fletcher v. Rylands* (¹), but I abide by what I there said. It seems applicable to this case, and I do not know how to amend it. But I will examine this case more particularly.

The defendants are the owners of land in which there is or was iron ore; a portion of the ore came to the surface, a portion was subterranean. The latter was got by mining, the former by quarrying. The quarrying caused a large hollow of various depths. Whether this hollow ever communicated with the underground works I know not. The underground works, by removing the support of the surface, caused, as I understand, subsidence, and so cracked the surface of the hollow, and made fissures down which water could escape, as I understand. Be this as it may, the result of the defendants' operations was a hollow, to the lowest part or parts of which water, if it got into the hollow, would flow, and which lowest part or parts was and were not watertight. A flood came; a brook (I omit here to 310] notice its diversion by the defendants) *overflowed, and instead of the water passing over the surface and getting away as it would have done, it got into the hollow so made by the defendants, and, of course, could not escape, except through the fissures or cracks, and, of course, did escape through them into the defendants' mine, and thence to the plaintiff's. How does this differ from *Fletcher v. Rylands*? (¹). The defendants here did not indeed make a reservoir. But suppose they had made the hollow originally excavated for other purposes into a reservoir, or fish pond or ornamental water, would the fact that it was originally for another purpose than holding water have made any difference? That cannot be. But it is said they did not bring the water there as in *Fletcher v. Rylands* (¹). Nor did they in one sense; but in another they did. They so dealt with the soil that if a flood came the water, instead of spreading of itself over the surface and getting away to the proper water-courses innocuously, collected and stopped in the hollow with no outlet but the fissures and cracks. Suppose the rain, without a flood, falling in this hollow had made, as it will, pools in the lower part, and the water so collected had gone through the fissures and cracks into the mine instead of being left on the surface to evaporate and percolate naturally, and that the damage to the plaintiff had been sensible, could the defendants say they were not liable because they did not cause the rain to fall?

So again, can they say they did not cause this flood water to collect where it did with no outlet except to the mines, because

(¹) Law Rep., 3 H. L.; 350; Law Rep., 1 Ex.; 205; 3 H. & C., 774.

it came there by the attraction of gravitation? It is said the flood was extraordinary, and they could not foresee it. I repeat my remark that that may take away moral blame from them, but how does it affect their legal responsibility? If for their own purposes they had diverted this flood into the hollow, when it came, then, though not knowing what would happen, it is clear they would be liable. Why are they not if it comes, because it must come, from natural causes?

It is to be observed the mischief the defendants have done is not merely in causing the water to come, but to stay, and stay in a leaky hollow. If it had come and could have got away, as before the hollow existed, there would have been no harm; nor would there have been *if the hollow had been watertight. Lord [311 Cairns says in *Fletcher v. Rylands* ⁽¹⁾, "The defendants, treating them as the owners or occupiers of the close on which the reservoir was constructed, might lawfully have used that close for any purpose for which it might in the ordinary course of the enjoyment of the land be used; and if in what I term the natural user of that land there had been any accumulation of water, either on the surface or underground, and if by the operation of the laws of nature that accumulation of water had passed off into the close occupied by the plaintiff, the plaintiff could not have complained that that result had taken place. On the other hand if the defendants, not stopping at the natural use of their close, had desired to use it for any purpose which I may term a non-natural use, for the purpose of introducing into the close that which in its natural condition was not in or upon it, for the purpose of introducing water either above or below ground in quantities and in a manner not the result of any work or operation on or under the land, and if in consequence of their doing so the water came to escape and to pass off into the close of the plaintiff, then it appears to me that that which the defendants were doing they were doing at their own peril." Surely in this case the accumulation of water without its natural outlet is not by the natural use of the land, and it is not by operation of the laws of nature alone that water has passed into the plaintiff's mine. And though what the defendants have done was not for the purpose, yet it had the result of introducing water in quantities and in a manner not the result of any work or operation on or under the land. So Lord Cranworth, in the same case speaking of *Smith v. Kenrick* ⁽²⁾, with which I wholly agree, says (at p. 341): "The damage sustained by the plaintiff was occasioned by the natural flow or percolation of water from the upper strata." The water was only left by the defendant to flow in its natural course, and at p. 342 he says: "If water naturally rising

(¹) Law Rep., 3 H. L., at p. 338.

(²) 7 C. B., 515.

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in the defendant's land had by percolation found its way down to the plaintiff's mine through the old workings, that would not have afforded any ground of complaint." If it should be said this water naturally came to the defendants' land, the answer is, it did not naturally come to the lowest parts of the hollow, and 312] it did not naturally stay there, except by reason of *the defendants having artificially made that hollow, and did not naturally escape except by the hollow not being watertight.

If the similitude to responsibility for a dangerous animal is looked for in this case it will be found the defendants did not indeed keep, but they created one for their own purposes and let it go loose. It is as though they had bred a savage animal and turned it out on the world.

I have hitherto dealt with the case without mentioning the fact that the defendants had diverted the brook, and that the water escaped from the artificial channel they had made and so got to the hollow, and thence to the mines. Such are the facts and the defendants, therefore, for their own purposes, brought the water to the place whence it escaped and did the mischief. They brought it there without providing the means of its getting away without hurt. This undoubtedly makes a case against them that calls for an answer. The answer they make is this: They say "we brought the water there, indeed, and did not provide sufficient outlet for it, but had we not altered the original course of the stream it would have escaped in greater quantities and done more mischief." My Brother Lush held this to be no answer, and I agree with him. It may seem strange that if the results of acts as a whole have done no harm to a person he should nevertheless have a right to complain of the results of one-half of those acts. But the plaintiff has a right to say, "You have caused this; had you left nature to itself worse might indeed have happened, but that would have been my misfortune; perhaps it would not have happened; perhaps we could have guarded against it. I decline to discuss this. You may indeed have done me good; if so, you should have done more good." What in effect is this answer of the defendants but a kind of set off, i.e., a set off of the good they have done against the mischief they did at the same time? Can it be an answer that the brook, unless diverted, would have overflowed in greater quantity and done more mischief in the same place? Obviously not. Yet, how does that differ from the present case? Or suppose the diversion flooded plaintiff's mine A, and the original brook would have flooded plaintiff's mine B. In fact the defendants have done that which has injured the plaintiff, and of that he is entitled to complain, and they have no right to set off a benefit 313] which they *were not asked by the plaintiff to confer on

him. On this ground also I think the ruling complained of is right; but of course the whole case must be taken together, and on that whole case my judgment is for the plaintiff. In this my Brothers Martin and Channell concur. The rule will therefore be discharged.

We are to say on what principle the arbitrator is to assess the damages. It is impossible to lay that down with precision. He may well take into account the shortness of the plaintiff's term if by reason of that the plaintiff will lose some of the mineral. He may well also take that into account in favor of the defendants if the term is so short that it would not pay the plaintiff to remove the water, as otherwise he might receive the damages and leave the defendants subject to an action by the lessors or plaintiff's reversioners. So also he may see if the mine is worth unwatering. If any more precise direction is required of us the matter must be mentioned particularly to us.

Rule discharged.

Attorneys for plaintiff: *Heller & Kirkbank.*

Attorneys for defendants: *Gregory Rowcliffes, & Co., for Musgrave Whitehaven.*

June 8, 1872.

*BROWN v. MULLER.

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[Law Reports, 7 Exchequer, 319.]

Contract to Deliver Goods at a future Time—Delivery in Monthly Parcels—Measure of Damages.

The plaintiff bought of the defendant 500 tons of iron, to be delivered in about equal proportions in September, October, and November, 1871. In August, 1871, the defendants gave notice to the plaintiff that he did not intend to deliver any iron. In December, the plaintiff commenced an action for non-delivery, and claimed as damages the difference on the 30th of November between the contract and market prices of the iron:

Held, that the proper measures of damages was the sum of the differences between the contract and market prices of one-third of 500 tons on the 30th of September, the 31st of October, and the 30th of November, respectively.

THIS was an action for non-delivery of iron.

At the trial before Lush, J., at the Liverpool Spring Assizes, 1872, it was proved that on the 21st of August, 1871, the plaintiff bought of the defendant 500 tons of iron of a specified quality, "delivery in about equal monthly quantities over September, October, and November." A misunderstanding having arisen about the exact quality of iron to be supplied—whether it was to be "forge" or "foundry" of a particular number—the defendant, on the 24th of August wrote to the plaintiff to request him "to consider the matter off," and on the 5th of September informed him in another letter that he regarded the contract as cancelled, and had expunged the order from his books.

The plaintiff did not reply to these letters, and on the 25th of October demanded delivery of 200 tons "as per contract." The defendant declined to deliver, alleging there had never been a contract. On the 4th of December the plaintiff wrote, stating that he had bought at the end of November 500 tons of iron against the quantity the defendant had refused to deliver. This action was brought to recover 237*l.* 10*s.*, being the difference between the contract price and that at which the plaintiff had bought. If the plaintiff had bought in when the defendant repudiated the contract the difference would have been 25*l.*; if he had bought in one-third at the end of each of the three months the sum of differences would have amounted to 109*l.* 4*s.*

A verdict was entered for the plaintiff for the full amount, 320] with *leave to the defendant to move to reduce the damages to such sum as the Court should direct.

A rule was obtained accordingly on the ground that the damages ought to be assessed with regard to the difference between the two prices at the time when the defendant gave notice to the plaintiff of his intention not to deliver any iron, or with regard to the differences on the 30th of September ⁽¹⁾.

June 7, 8. *Aspinall*, Q.C., and *Shield*, showed cause. The plaintiff is entitled to the whole difference between the contract price and the price at the end of November. It is true that he might, if he had pleased, have treated the defendant's repudiation as a breach of contract, and then maintained an action on the principle of *Hochster v. De la Tour* ⁽²⁾, and *Frost v. Knight* ⁽³⁾, but he may wait until the last day on which the defendant might have delivered: *Phillpotts v. Evans* ⁽⁴⁾.

[BRAMWELL, B. Quite apart from *Hochster v. De la Tour* ⁽²⁾, there was an absolute breach at the end of September. Ought not the plaintiff, either when the defendant repudiated or at the end of the first month, to have endeavored to provide himself with another contract?]

He has an option. He is not bound to make a new contract which may or may not turn out advantageous to him.

[KELLY, C.B. The defendant was to deliver in about equal quantities in each month. It seems to me that the true measure of damages is the sum of the differences at the end of each month between the contract and market prices of one-third of the 500 tons.]

⁽¹⁾ Leave was also reserved to enter a nonsuit, on the ground that there was no binding contract between the parties, and the rule obtained was to enter a nonsuit as well as to reduce the damage; but it is unnecessary to report the arguments or judgments upon the first point.

The Court discharged the rule so far as it related to the entry of a nonsuit, being of opinion that there was a contract to deliver 500 tons "foundry" iron disclosed upon the correspondence.

⁽²⁾ 2 E. & B., 678; 22 L. J. (Q.B.), 455.

⁽³⁾ Ante, p. 111. ⁽⁴⁾ 5 M. & W., 475

According to *Leigh v. Pullerson* ⁽¹⁾ the last day of the whole period is the proper date when goods are to be delivered between specified days.

*[MARTIN, B., referred to *Boorman v. Nash* ⁽²⁾, and *Jos- [321*
ling v. Irvine ⁽³⁾, as supporting the view suggested by Kelly, C.B.]

Herschell, Q.C. In support of the rule. The verdict is clearly entered for too much. The plaintiff cannot lie by until the close of the whole period. *Leigh v. Paterson* ⁽⁴⁾ is not an authority for that proposition. That case might have applied if the defendant might have delivered the whole 500 tons on the last day of November, but it has no application where the goods are to be delivered in parcels. The proper date for fixing the damage on such a contract is either on the day of repudiation or at all events, on the day when the contract is irrevocably broken : i. e., in this case either on the 24th of August or the 30th of September. The plaintiff ought to have entered into a new contract to the same effect as the broken one. Or, again, if neither of these days be accepted, the plaintiff at the outside is only entitled to the aggregate of the differences at the end of each of the three months.

KELLY, C.B. I should not have felt much doubt as to what should be the measure of damages in this case, but for the hesitation expressed during the argument by my Brother Martin ; a hesitation which, however, I understand now to be removed. The defendant undertook in this case to deliver 500 tons of iron during the months of September, October, and November, 1871, in about equal portions ; that is at the rate of about 166 tons in each month ; and he has failed to deliver altogether. Now the proper measure of damages is that sum which the purchaser requires to put himself in the same condition as if the contract had been performed. This being the general principle of assessment, we find that the defendant delivered no iron in September, and on the 30th of that month, I think, the plaintiff was entitled to receive, as damages, the difference on that day between the contract and market price of 166 tons. No other satisfactory principle can be suggested. The plaintiff might have resold this amount of iron to a sub-purchaser, and to satisfy this sub-contract might have bought at the then market price ; or else must have paid the sub-purchaser *the difference ; [322 and in either case would be entitled to receive it from the defendant. Then, when the 31st of October arrives, the same state of things recurs as to the second instalment of iron to be delivered ; and again the damages will be the difference between

⁽¹⁾ 8 Taunt., 540.

⁽²⁾ 9 B. & C., 145.

⁽³⁾ 6 H. & N., 512 ; 30 L. J. (Ex.), 78.

⁽⁴⁾ 8 Taunt., 540.

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the contract and market prices on that day. And a similar calculation must be made with reference to the end of November. Therefore the plaintiff will be entitled to recover, altogether, the sum of the three differences at the end of the three months respectively.

It has been argued with much ingenuity that the damages ought to be estimated at a lower figure if it appear that when the defendant announced his intention of not delivering, or at all events when the first breach took place, and it became apparent that the contract could never be performed at all, the plaintiff might have entered into a new contract to the same effect as the old one for the months of October and November on as favorable terms; and if the plaintiff, on hearing he would never get delivery, was bound to go and obtain, if he could, the new contract suggested, then, no doubt, assuming that he might have made such a contract, the damages ought to be limited to his loss at that time. But there was, in my opinion, no such obligation. He is not bound to enter into such a contract, which might be either to his advantage or detriment, according as the market might fall or rise. If it fell, the defendants might fairly say that the plaintiff had no right to enter into a speculative contract, and insist that he was not called upon to pay a greater difference than would have existed had the plaintiff held his hand. Or again, by such a course, the plaintiff might be seriously injured and yet have no remedy. Suppose, for example, his new contract was with a person who proved insolvent. He would, in that case, be without redress; he would have lost his former contract, and his new one would turn out worthless. In either event, therefore, I do not think the plaintiff could be called upon to enter into a fresh contract. If he did, and thus obtained an advantage, he no doubt might save the defendant from some damages. But if he should suffer a loss, as by the insolvency of the new contractor, he could not make the defendant answer for it. And if it should happen that he might have done better for the defendant by waiting and making no speculative contract, the defendant would in his turn have a fair
323] *right to complain that his loss had not been mitigated as far as possible.

The case of *Frost v. Knight* (1) has been referred to as showing that there is a difference between cases where the contract is treated as still subsisting and where it is treated as at an end. Now the plaintiff might, if he had so elected, have treated the contract as at an end when the defendant announced his intention to break it. But that is a matter of election on the plaintiff's part, and even although he had elected thus to treat the

(1) Ante, p., 111.

contract, yet in considering the question of damages they would still be estimated with reference to the times at which the contract ought to have been performed, that is, in this case, at the end of the months of September, October, or November. The damages should therefore be assessed on the principle I have indicated, and the rule made absolute to reduce the damages to 109*l.* 4*s.*

MARTIN, B. In deference to authority I come to the same conclusion. But for my own part I should have been disposed to think that the damages ought to have been estimated once for all when a complete breach of the contract had been committed. But the cases of *Boorman v. Nash* ⁽¹⁾ and *Josling v. Irvine* ⁽²⁾ decide the matter. The last case, which was an action for the non-delivery of naphtha in weekly parcels, appears to place the true rule beyond doubt. In the course of the argument, Wilde, B., observes ⁽³⁾: "I want to know the market prices at the end of the first, second, and third weeks, when the naphtha was to be delivered;" and my brother Channell in giving judgment says ⁽⁴⁾: "If, at the end of the first week when the first portion was to be delivered by the defendant, the price had risen, the plaintiff would be entitled to damages proportionate to the rise in price at that period; and so at the end of the second week when the second portion was to be delivered, and again at the end of the third week." Again, in his judgment, Wilde, B., repeats that the damages must be assessed with reference to the market prices on each of the days fixed for the delivery of the naphtha. The verdict *must, therefore, be reduced in [324 this case to the amount pointed out by the Lord Chief Baron.

CHANNELL, B. I am also of opinion that the rule to reduce the damages should be made absolute. I by no means desire to interfere with the rule that where there is a contract to deliver goods on a specific day the proper measure of damages is the difference on that day between the market and contract prices. But where the contract is to deliver in parcels at definite but different times, as here at the end of the three months of September, October, and November, there I think the difference should be taken at the end of each period. The time when a contract is broken is one thing, the time when it is to be performed may be quite another. Here it was to be performed by three separate deliveries of goods on specified days. And under these circumstances, in order to measure the damages, resort must be had to each final day of performance. The cases of *Boorman v. Nash* ⁽¹⁾ and *Josling v. Irvine* ⁽²⁾ are express on this

⁽¹⁾ 9 B. & C., 145.

⁽²⁾ 6 H. & N., 512; 30 L. J. (Ex.), 78.

3 ENG. REP.

⁽³⁾ 30 L. J. (Ex.), at p. 79.

⁽⁴⁾ 30 L. J. (Ex.), at p. 80.

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point. The right days, therefore, for ascertaining the damages were the 30th of September, the 31st of October, and 30th of November, respectively, and the total recoverable is the sum of the differences on those days ⁽¹⁾. *Rule absolute accordingly.*

Attorneys for plaintiff: *Ennells & Sons, for Barr, Nelson, & Barr, Leeds.*

Attorneys for defendant: *Pritchard & Englefield, for Ramwell, Pennington, & Hindle, Manchester.*

May 30, 1873.

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*BALDWIN V. CASELLA.

[Law Reports, 7 Exchequer, 325.]

Mischierous Animal — Evidence of Scierter.

If the owner of a dog appoints a servant to keep it, the servant's knowledge of the dog's ferocity is the knowledge of the master.

ACTION brought by an infant, suing by his father as next friend, for a bite inflicted on the plaintiff by the defendant's dog.

At the trial before Cleasby, B., at the sittings at Westminster, in Trinity Term, it appeared that the dog was an ordinary carriage dog, and was kept in a stable of the defendant's situated in a mews, and was under the care and control of the defendant's coachman, who lived there. The dog ran about the mews, and there was evidence which satisfied the jury that he had once, about a year before, knocked down the plaintiff and scratched him, and that this was known to the coachman ⁽²⁾. It was not, however, known to the defendant, who supposed the dog to be harmless, and allowed it to play with his own children.

The learned judge directed the jury, that if the coachman knew of the previous attack by the dog, his knowledge was the knowledge of his master, and that the defendant was liable. The jury found a verdict for the plaintiff for 10*l*.

Pope, Q. C., moved for a new trial on the ground of misdirection. The direction of the learned judge goes beyond any existing decision. The case which comes nearest to it is *Johnson v. Gladman* ⁽³⁾; but that case was decided upon the inference that the wife had in fact communicated to her husband, the defendant, the notice she had received of the dog's ferocity, or at least on the view that the jury might have fairly drawn that inference; see per Willes and Montague Smith, JJ. ⁽⁴⁾.

⁽¹⁾ *Bramwell, B.*, had left the court before the judgment was delivered.

⁽²⁾ The evidence was very scanty, had on two previous occasions attacked but the verdict being under 20*l*., the persons passing through the mews; but the defendant could not move against evidence. In order to prove the vicious temper of the dog, it was shown that he

this was not known either to the defendant or to his coachman.

⁽³⁾ 36 L. J. (C.P.), 153.

⁽⁴⁾ 36 L. J. (C.P.), at p. 155.

The case therefore decides nothing; or if it decides anything, it is that but for that *inference there would have been [326 no evidence to charge the defendant. But here it was distinctly proved that the defendant had no knowledge nor suspicion of the dog's ferocity. Therefore *Johnson v. Gladman* ⁽¹⁾ is either no authority or an authority in his favor. Again in *Stiles v. Cardiff Steam Navigation Company* ⁽²⁾, it is thrown out that if those had notice who were appointed by the owner of the dog to keep it, with "power to put an end to the keeping of it," notice to them would be notice to the owner. But there is no decision to that effect; and, moreover, there is no evidence here that the defendant's coachman had power to put an end to the keeping of the dog.

MARTIN, B. I think the direction of the learned judge was right. The dog was kept in the defendant's stable, and the defendant's coachman was appointed to keep it; the coachman knew that the dog was mischievous, and it is immaterial whether he communicated the fact to his master or not; his knowledge was the knowledge of his master. The opinion of Crompton, J., in *Stiles v. Cardiff Steam Navigation Company* ⁽³⁾ is to that effect, and I should be slow to differ from any opinion of that learned judge.

BRAMWELL, B. I am of the same opinion. It appears to be the rule of law, that the possibility of loss and injury arising to others from things which are likely to be dangerous, raises on the part of those who have them under their control, a duty to inform themselves about them. So one who employs others to climb ladders in a place where people are passing, is bound to take care that no injury arises to the passers by; and if he delegates to a foreman or servant the duty of seeing that the ladders are sound, the negligence of the foreman or servant is the negligence of the master. So all dogs may be mischievous; and therefore a man who keeps a dog is bound either to have it under his own observation and inspection, or, if not, to appoint some one under whose observation and inspection it may be. The defendant has appointed his coachman to that duty; the coachman knew of the mischievous *propensities of the [327 dog; and his knowledge is the knowledge of the master.

CHANNELL, B., concurred.

Rule refused.

Attorney for plaintiff: *Charles Thomas.*

Attorney for defendant: *Crump.*

⁽¹⁾ 36 L. J. (C.P.), 153.

⁽²⁾ 33 L. J. (Q.B.), 310, at p. 312.

⁽³⁾ 33 L. J. (Q.B.), 310.

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June 6, 1872.

339] *ALLGOOD and others v. BLAKE. ROACH v. BLAKE. CLEN-
NELL v. BLAKE. REED v. BLAKE.

[Law Reports, 7 Exchequer, 339.]

Will — General Intent — Estate to be enjoyed by one Person — “All and every other the issue of my Body” — “Other the Issue” — Words of exclusion or completion — “For default of such Issue.”

A testator devised his hereditaments to his son for life, with remainder to F., his son's eldest son, for life, with remainder to the first and other sons of F., successively in tail male; and for default of such issue, to R., the second son of his son, for life, with remainder to the first and other sons of R., successively in tail male; and for default of such issue, to the third, fourth, and other sons of his son thereafter to be born successively in tail male; and for default of such issue, to his daughter I., for life, with remainder to her first and other sons in tail male; and for default of such issue, to his granddaughter E., for life, with remainder to her first and other sons in tail male; and for default of such issue, to his granddaughter J., for life, with remainder to her first and other sons successively in tail male; and for default of such issue, to his granddaughter S., for life, with remainder to her first and other sons successively in tail male; and for default of such issue, to all and every the fourth and fifth and other daughter or daughters of his son successively, and in remainder one after another, and to the heirs males of their bodies; and for default of such issue, “to the use and behoof of all and every other the issue of my body;” and for default of such issue to his right heirs. The will also contained a wish that the estates should be retained in the hands of one person, and should not be dispersed, and a provision that any female who inherited should with her husband (if married) assume the testator's name and arms under the penalty of forfeiting the estates. A muniment box was directed to go to the person entitled from time to time to the estates:

Held, 1st, that the words “issue of my body” in the penultimate limitation, were to be read in the same sense as “heirs of my body;” 2dly, that, having regard to the whole will, that devise could not be read as giving the estate per capita in joint tenancy to all who came within the class at the time the estates vested in possession; 3dly, that the words “all and every” did not import that all were to take at the same time, but were satisfied by all taking in succession; and 4thly (Bramwell, B., dissentiente), that the word “other” was to be read not as a word of exclusion, but of completion; and that upon these principles of construction, there was, by virtue of the penultimate limitation, a vested remainder at the death of the testator in tail general to which his son then became entitled.

This remainder descended to F., who duly executed a disentailing deed. He devised the estate to the defendant's father, from whom it descended to the defendant. In actions of ejectment (a), by persons claiming as issue of the body of the testator as joint tenants per capita at the time the estates vested in possession (b), by the heiress in tail general of the testator at the same period (c), by the heir of the survivor of all the issue of the testator living at his death (other than these included in the particular limitations), and (d) by the heir in tail of the testator at his death, these being excluded who came within the particular limitations:

Held, that the defendant was entitled to judgment.

Mandeville's Case (Co. Litt., 26 b), considered.

SPECIAL CASES stated in four actions of ejectment brought to recover possession of fourteen forty-eighth parts of a farm and lands called High Letham, in Berwick-upon-Tweed.

340] *Sir Francis Blake, Bart. (the first baronet) was at the date of his will (the 8th of March, 1780) and of his death (the 29th of March, 1780) seized in fee of the farm and lands in ques-

tion, and of certain other property, including his two mansions of Twizell Castle and Tilmouth Park, then in the county of Durham (but now in Northumberland), and also of the reversion of several estates in the county of Durham expectant upon the failure of issue male of his eldest son Francis (the second baronet).

At the date of the will the first baronet had living two children, namely, Francis and Isabella. The second baronet had at that time five children living, namely, Francis (third baronet), Robert Dudley, Elizabeth, Isabella, and Sarah.

By his will the first baronet, after charging all his manors, castle lands, &c., with certain payments (which were afterwards duly made) and creating a term of 1000 years upon certain trusts which were afterwards satisfied) devised his hereditaments to the use of his son Francis for life, with remainder to trustees during the life of Francis, to preserve contingent remainders, with remainder to the use of Francis, eldest son of the second baronet (the third baronet), for life, with remainder to the first and other sons of the third baronet successively in tail male; and for default of such issue, to Robert Dudley Blake, second son of the second baronet, for life with remainder to his first and other sons successively in tail male; and for default of such issue, to the third, fourth, and other sons of the second baronet thereafter to be born successively in tail male; and for default of such issue, to Isabella Blake, the testator's daughter, for life, with remainder to her first and other sons successively in tail male; and for default of such issue, to Elizabeth Blake, eldest daughter of the second baronet for life, with remainder to her first and other sons successively in tail male; and for default of such issue, to Isabella Blake, second daughter of the second baronet, for life, with remainder to her first and other sons successively in tail male; and for default of such issue, to Sarah Blake, third daughter of the second baronet, for life with remainder to her first and other sons successively in tail male; and for default of such issue, to all and every the fourth, fifth, and other the daughters of the second baronet successively for life, and with remainders to her heirs male of their bodies respectively; and "for default of such issue to the *use and [341 behoof of all and every other the issue of my body lawfully to be begotten; and for default of such issue, to the use and behoof of my own right heirs for ever."

The testator also, after reciting that the reversion in fee of the several estates in the county of Durham was vested in him and his heirs upon failure of the male line of the second baronet, further gave and devised all and every the estates to which he was so entitled in reversion in case of failure of the male line

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of the second baronet to the trustees and their heirs to, for, and subject to such and so many of the uses, &c., in the will before expressed and declared of and concerning his other real estates by his will before devised on failure of issue male of the said second baronet, as should then be in existence undetermined or capable of taking effect. Immediately after the last mentioned devise the following words occurred: "And thus having at least expressed a very natural desire to continue my name and property upon a respectable footing, and to prevent as far as may be the dispersion of my estates amongst several persons, and to keep up my name and family in one person, I do hope that the person into whose hands my estates shall come, whether by virtue of this my will or by means of fines or recoveries, or other acts in the law defeating the uses and limitations of the present entails or otherwise howsoever, will be equally ready to adopt the plan for the purposes aforesaid."

The will also contained a proviso making it incumbent on the females in the line of descent, when married, to return, and on their husbands to take, the name and arms of Blake as and when they should respectively come into possession of the estates, and in case of neglect or refusal so to do, the person next in remainder was to take the property. Further, there was a clause whereby the testator declared his wish to be that a certain iron chest or muniment box should go to the person entitled to his real estate from time to time.

On the testator's death the second baronet entered on possession of the family estates, including High Letham, and so continued until his death in June, 1818, when he was succeeded by the third baronet, who remained in possession until his death in August, 1860. The second baronet also left two other sons 342] surviving him, *viz., Robert Dudley and William, and one daughter, Eleanor Ann. Isabella Blake, the eldest daughter of the first baronet, and Elizabeth, Isabella, and Sarah Blake, daughters of the second baronet, died unmarried in the second baronet's lifetime.

In the year 1834 the third baronet executed an assurance for the purpose of barring a certain estate tail in certain messuages and lands (including High Letham), which estate tail was thereby recited to be vested in him by the will of the first baronet expectant on the failure or determination of the estates in tail male limited to the use of the first and other sons of the third baronet, and the death and failure of issue male of his brothers Robert Dudley and William and his sister Eleanor Ann, and all reversions and remainders thereon expectant or depending.

On the 15th of October, 1845, the third baronet made his will, whereby, after reciting that under his grandfather's will and

other acts and assurances he was entitled to the remainder in fee of certain manors, messuages, &c. (including High Letham), he devised the whole of those manors, messuages, &c., subject to the estates limited by his grandfather's will, to one Francis Blake for life, with remainder to his first and other sons in tail male. Francis Blake died intestate in July, 1861, leaving the defendant, his eldest son and heir at law, him surviving.

Robert Dudley Blake and William Blake died without issue in the lifetime of the third baronet. Eleanor Ann intermarried with one Bethel Stag, and on the death of the third baronet entered into possession of the family estates, assuming at the same time the name and arms of Blake. She died on the 12th of August, 1869, without issue male, but leaving a daughter, Eleanor Ann Roach, her surviving, who was also heiress at law to the first, second, and third baronets.

She was the plaintiff in the second action.

Besides his daughter Isabella, the first baronet had another daughter Sarah, who died before the will was made. She married one Christopher Reed, and had numerous issue. The plaintiff in the third action, Perceval Fenwick Clennell, was her grandson. The mother of Perceval (Sarah's daughter), was the survivor of all the issue of the testator living at his death, other than those included in the particular limitations, and this plaintiff, as her heirs, *claimed the entirety. He also joined in [343 the first action, and claimed in the manner indicated below. In the fourth action the claimant was Francis Reed, a grandson of Sarah Reed. He claimed the entirety as heir in tail of the testator at his death, all those being excluded who came within the particular limitations, i.e., his claim was the same in character as that of Eleanor Ann Roach, except that he claimed as upon a remainder vested at the death of the testator, whereas in Mrs. Roach's case the remainder was contingent.

The plaintiffs in the first action were among the issue of the body of the testator of the line of Sarah Reed, and claimed the property as joint tenants under the penultimate limitation in the will. The estate, they contended, was given per capita under that limitation to all persons who came within the class at the time of the death of Mrs. Stag in 1869.

The questions for the court in the several actions were, whether any, and which, of the plaintiffs in those actions respectively were entitled to recover.

The case was argued on April 29, May 1, and May 2, 1872, by the following counsel:

For the plaintiffs in the first action: *Sir R. Palmer*, Q.C. (*Manisty*, Q.C., *Waley*, and *Bruce* with him);

For the plaintiff in the second action: *Sir G. Jessel*, Q.C., S.G., (*W. H. Bagshaw* and *Wallis* with him);

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For the plaintiff in the third action: *H. F. Bristowe*, Q.C., (*Harrison Dalton* with him);

For the plaintiff in the fourth action: *Pollock*, Q.C. (*Day*, Q.C., with him);

For the defendant in these four actions: *Sir J. B. Karlake*, Q.C., and *Charles Hall* (*Kemplay*, Q.C., with them).

There was also a fifth action brought by the plaintiffs in the first action in respect of other property against another defendant, who also claimed under the will of the third baronet, and whose interest was therefore identical with that of the defendant in the other actions. For him *Williams*, Q.C., (*Trevelyan* and *C. Browne* with him) appeared.

344] *The course and nature of the arguments sufficiently appear from the judgment.

For the plaintiffs in the first action the following authorities were cited: *Lewis* on Perpetuities, pp. 663-671; 2 Co. Litt., by Hargreave and Butler, 272 a, note ⁽¹⁾, s. 5; Prior on Issue, book i. pp. 6, 12, 26; Jarman on Wills, 3d ed. vol. ii. pp. 56, 89-91, 143; *Lee v. Busk* ⁽¹⁾; *Nicholls v. Sheffield* ⁽²⁾; *Heasman v. Pearse* ⁽³⁾; *Ranelagh v. Ranelagh* ⁽⁴⁾; *Lewis d. Ormond v. Waters* ⁽⁵⁾; *Surtees v. Surtees* ⁽⁶⁾; *Greene v. Ward* ⁽⁷⁾; *Davenport v. Hanbury* ⁽⁸⁾; *De Windt v. De Windt* ⁽⁹⁾; *Wright v. Vernon* ⁽¹⁰⁾; *Bernard v. Montague* ⁽¹¹⁾; *Cooper v. Pitcher* ⁽¹²⁾; *Freeman v. Parsley* ⁽¹³⁾; *Dalzell v. Welch* ⁽¹⁴⁾; *Cook v. Cook* ⁽¹⁵⁾; *Rowland v. Morgan* ⁽¹⁶⁾; *Knight v. Selby* ⁽¹⁷⁾; *Whitlocke v. Heddon* ⁽¹⁸⁾; *Atkinson v. Holby* ⁽¹⁹⁾; *Clavering v. Ellison* ⁽²⁰⁾; *Egerton v. Earl Brownlow*. ⁽²¹⁾

For the plaintiff in the second action were cited Co. Litt. by Hargreave and Butler, 19 a, 20 b, 22 a, 24 b, and note to 24 b; *Fearne* on Contingent Remainders, p. 180; *Cruise's Digest*, vol. i. p. 69; *Whitlock v. Heddon* ⁽¹⁸⁾; *Mandeville's Case*. ⁽²²⁾

For the plaintiff in the third action were cited Jarman on Wills, 3d ed. vol. i, p. 758; *White v. Coram* ⁽²³⁾; *Morgan v. Britten*. ⁽²⁴⁾

For the plaintiff in the fourth action were cited Jarman on Wills, 3d ed. vol. ii, p. 77 *Whitlock v. Heddon* ⁽¹⁸⁾; *Grey v. Pearson* ⁽²⁵⁾; *Lees v. Mosley* ⁽²⁶⁾; *Roe d. Dodson v. Grew* ⁽²⁷⁾;

⁽¹⁾ 14 Beav., 459.

⁽²⁾ 1 Bro. C. C., 215.

⁽³⁾ Law Rep., 11 Eq., 522; *Ibid.*, 7 Ch.

App. 275.

⁽⁴⁾ 12 Beav., 200.

⁽⁵⁾ 6 East, 836, at p. 846.

⁽⁶⁾ Law Rep., 12 Eq., 400.

⁽⁷⁾ 1 Russ., 262.

⁽⁸⁾ 3 Ves., 257.

⁽⁹⁾ Law Rep., 1 H. L., 87.

⁽¹⁰⁾ 7 H. L. C., 85.

⁽¹¹⁾ 1 Mer., 422.

⁽¹²⁾ 4 Hare, 485.

⁽¹³⁾ 3 Ves., 421.

⁽¹⁴⁾ 2 Sim., 319.

⁽¹⁵⁾ 2 Vern., 545.

⁽¹⁶⁾ 2 Ph., 764.

⁽¹⁷⁾ 8 M. & G., 92.

⁽¹⁸⁾ 1 B. & P., 248.

⁽¹⁹⁾ 10 H. L. C., 313.

⁽²⁰⁾ 3 Drew., 451.

⁽²¹⁾ 4 H. L., 1.

⁽²²⁾ Co. Litt., 26 b.

⁽²³⁾ 3 K. & J., 652.

⁽²⁴⁾ Law Rep., 13 Eq., 28.

⁽²⁵⁾ 6 H. L. C., 61, at p. 68.

⁽²⁶⁾ 1 Y. & C., 589.

⁽²⁷⁾ 2 Wils., 322.

**Doe d. Blandford v. Applin* ⁽¹⁾; *Roddy v. Fitzgerald* ⁽²⁾; *Han-* [345
naford v. Hannaford ⁽³⁾; *Doe d. Cock v. Cooper* ⁽⁴⁾.

For the defendants in all the actions the following authorities were cited: *Abbott v. Middleton* ⁽⁵⁾; *Jenkins v. Hughes* ⁽⁶⁾; *Byng v. Byng* ⁽⁷⁾; *Wild's Case* ⁽⁸⁾; *Doe d. Earl of Scarborough v. Savile* ⁽⁹⁾; *Earl of Tyrone v. Marquis of Waterford* ⁽¹⁰⁾; *Mandeville's Case* ⁽¹¹⁾; *Wright v. Vernon* ⁽¹²⁾; *King v. Melling* ⁽¹³⁾; *Roddy v. Fitzgerald* ⁽²⁾; *Stanley v. Lennard* ⁽¹⁴⁾; *Jordan v. Adams* ⁽¹⁵⁾; *Woodhouse v. Herrick* ⁽¹⁶⁾; *Crozier v. Crozier* ⁽¹⁷⁾; *Petty v. Goddard* ⁽¹⁸⁾; *Lethieullier v. Tracy* ⁽¹⁹⁾; *Doe d. Gallini v. Gallini* ⁽²⁰⁾; *James v. Richardson* ⁽²¹⁾; *Burchett v. Durdant* ⁽²²⁾; *Greene v. Warde* ⁽²³⁾; *Goodtitle v. Pugh* ⁽²⁴⁾; *Doe d. Bean v. Halley* ⁽²⁵⁾; *Roe d. Dodgson v. Grew* ⁽²⁶⁾; *Purr v. Swindels* ⁽²⁷⁾; *Doe d. Blandford v. Applin* ⁽¹⁾; *Montgomery v. Montgomery* ⁽²⁸⁾; *Kavanagh v. Morland* ⁽²⁹⁾; *Taylor v. Sayer* ⁽³⁰⁾; *Doe d. Cock v. Cooper* ⁽⁴⁾; *Broughton v. Langley* ⁽³¹⁾; *Jarman on Wills*, 3d ed. vol. ii. p. 406; *Fearne, Contingent Remainders*, 80, 180, 526; *Plowden*, 29; *Preston on Estates*, vol. ii, pp. 506, 507; *Hayes on Limitations*, pp. 1, 28; *Powell on Devises*, 3d ed. vol. ii, p. 596; *Hargreave's Tracts*, p. 565.

Cur. adv. vult.

June 6. The judgment of the Court (Kelly, C.B., Martin, Bramwell, and Cleasby, BB.) was delivered by

CLEASBY, B. The first of the above actions, *Allgood and others v. Blake*, was brought to recover the possession of four- [346
 teen forty-eighth parts of a farm, messuages, and lands called High Letham or High Latham, in the county of the borough and town of Berwick-upon-Tweed.

The question for consideration is the proper construction of a clause in the will of Sir Francis Blake, which was executed in January, 1780. The testator died in the March following. At the time of making the will he had living a son Francis, and a daughter, Isabella. Another daughter, Sarah, had married a

⁽¹⁾ 4 T. R., 82.

⁽²⁾ 6 H. L. C., 823.

⁽³⁾ Law Rep., 7 Q. B., 116.

⁽⁴⁾ 1 East, 229.

⁽⁵⁾ 7 H. L. C., 68, at p. 114.

⁽⁶⁾ 8 H. L. C., 571.

⁽⁷⁾ 10 H. L. C., 171.

⁽⁸⁾ 6 Rep., 16 b.

⁽⁹⁾ 3 A. & E., 897.

⁽¹⁰⁾ 1 D. F. & J., 613.

⁽¹¹⁾ Co. Litt., 26 b.

⁽¹²⁾ 2 Drew., 439; 7 H. L., 35.

⁽¹³⁾ 1 Vent., 214, 225.

⁽¹⁴⁾ 1 Eden, 87.

⁽¹⁵⁾ 9 C. B. (N.S.), 483; 30 L. J., (C.P.), 161.

⁽¹⁶⁾ 1 K. & J., 352.

⁽¹⁷⁾ 3 Drur. & War., 353.

⁽¹⁸⁾ Bridgman, 35.

⁽¹⁹⁾ 3 Atk., 728.

⁽²⁰⁾ 5 B. & Ad., 621; S.C. in error, 3 A. & E., 340.

⁽²¹⁾ Pollexfen, 457, at pp. 461, 462.

⁽²²⁾ 2 Vent., 311.

⁽²³⁾ 1 Russ., 262.

⁽²⁴⁾ 3 Bro. P. C., 454.

⁽²⁵⁾ 8 T. R., 5.

⁽²⁶⁾ 2 Wils., 322; S.C. in Wilmot's notes, 272.

⁽²⁷⁾ 4 Russ., 233.

⁽²⁸⁾ 8 Ir. Eq., 740.

⁽²⁹⁾ Kay, 16.

⁽³⁰⁾ Cro. Eliz., 742.

⁽³¹⁾ 2 Ld. Raym., 873.

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person of the name of Christopher Reed, and died in the year 1771, leaving several children, male and female, surviving.

His son Francis had living at the time of making the will two sons, Francis, and Robert Dudley, and three daughters, Elizabeth, Isabella, and Sarah.

The will is technically framed, and all the life estates are followed by a devise to trustees to preserve contingent remainder. Bearing that in mind, its substance may be stated for the purpose of the present question, as follows. After charging all and singular his manors, messuages, castle lands, hereditaments, and estates, with certain payments, which are to be taken as having been duly made, and creating a term of 1000 years upon certain trusts which have been satisfied, he devised his hereditaments to his son Francis for life, with remainder to Francis, the eldest son of his son Francis, for life, with remainder to the first and other sons of Francis the grandson successively in tail male; and for default of such issue, to Robert Dudley Blake, the second son of Francis the son, for his life, with remainder to his first and other sons successively in tail male; and for default of such issue, to the third, fourth, and other sons of the son Francis thereafter to be born successively in tail male; and in default of such issue, to testator's daughter Isabella for life, with remainder to the first and other sons of his daughter Isabella in tail male; and for default of such issue, to his granddaughter Elizabeth for life, with remainder to her first and other sons successively in tail male; and for default of such issue, to the testator's granddaughter Isabella for life, with remainder to her first and other sons successively in tail male; and for default of such issue, to the testator's granddaughter Sarah for life, with remainder to her first and other sons successively in tail male; *and for default of such issue, to all and every the fourth, fifth, and other daughter and daughters of Francis the son successively, and in remainder one after another and to the heirs male of their bodies.

It should be here noticed that all the limitations, including and following that to Isabella, the daughter of the testator (the first female who comes in), are expressly made subject to a proviso or condition in the will, contained in the name and arms clause which will be particularly noticed hereafter.

The next limitation is the one upon which the question arises and is in the following words:

"And for default of such issue to the use and behoof of all and every other the issue of my body." And upon this there immediately follows another limitation: "and for default of such issue, to my right heirs for ever."

The first of the two limitations may be correctly called, as

was done through the argument, the "penultimate" limitation, and the latter one the "ultimate" limitation. The particular words "to all and every other issue of my body," taken by themselves, were, it was contended, susceptible of two meanings: they may be taken to signify a distribution as if the testator had said "to and among all and every the issue, &c.," in which case they would be words of purchase; or they may signify succession and not distribution like "heirs of the body," in which case they would be words of limitation, although they might also in some sense operate as words of purchase according to *Mandeville's Case* ⁽¹⁾ as will afterwards be pointed out.

In considering which of these two senses should be given to the words, it was important to examine other parts of the will to see whether there was any clear general intent of the testator which could properly be considered as applicable to the construction of the penultimate limitation. And upon the meaning and effect of other parts of the will there was a very full argument before us.

In addition to the estates of which the testator was seized in possession he was entitled in reversion, upon the failure of male issue of his son Francis, to certain estates in the county of Durham, and he devised this reversion to such of the uses limited in the will concerning his other estates upon such failure of male issue of his *son as should then be in existence and [348 capable of taking effect. And after the last mentioned devise the following clause occurs in the will:

"And thus having at least expressed a very natural desire to continue my name and property upon a respectable footing, and to prevent as far as may be the dispersion of my estates amongst several persons, and to keep up my name and family in one person, I do hope that the person into whose hands my estate shall come, whether by virtue of this my will, or by means of fines or recoveries, or other acts in law defeating the uses and limitations of the present entails, or otherwise howsoever, will be equally ready to adopt the plan for the purposes aforesaid."

Another clause referred to was the clause making it incumbent upon the females in the line of descent, when married to take the name and arms of Blake the language of which was much discussed, and which was in the following words:

"Upon this express condition, that they the said several persons above named, and the several and respective husbands of such of them as shall marry, and their respective sons and issue male, who are to take by virtue of and under the limitations hereinbefore contained, do and shall, when and as they shall respectively come into and be in the actual possession of my

(¹) Co. Litt., 28 b.

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said real estates or any part thereof by virtue of or under the limitations hereinbefore mentioned and contained, and during such time as they shall respectively be in possession of the same estates and premises or any part thereof, and for ever thereafter assume and take upon himself, herself, and themselves respectively, and continue to use the surname of Blake only, and no other surname, and bear the coat of arms of that family, and shall in all deeds, writings, letters, and other instruments of writing, be styled and called by the surname of Blake only, and set, and subscribe, and write his, her, and their names respectively Blake only to all and every such deeds, writings, letters, and other instruments. And that in case such person or persons as aforesaid shall neglect or refuse so to do for the space of six calendar months next after he, she, or they shall become so entitled to the said estates as aforesaid, the person or persons so neglecting or refusing shall not have or take any benefit, estate, or interest under or by virtue of this my will of or *in the said estates and premises, and that in such case the person who by virtue of the limitations aforesaid is to take next in remainder after the person or persons so neglecting or refusing shall enter upon, have, and enjoy all the said estates and premises in as full and beneficial a manner as if the person or persons so neglecting or refusing was or were actually dead. Provided that such person in remainder to take by virtue or in consequence of such neglect or refusal shall assume and take upon him or her and continue to use the surname of Blake only, and bear the coat of arms of Blake as aforesaid."

And, further, the language of the clause in the latter part of the will relating to the iron chest or muniment box was alluded to, in which the testator declares his will to be, that it shall go to the person entitled to his real estates from time to time.

It was contended on the part of the defendant, that the whole will taken together showed in the clearest manner a general intent in the testator that the estate should go to be enjoyed by one person in any possible line of descent from him before the devise to the heirs general would take effect.

He relied upon the manner in which the successive life estates forming separate lines of descent were specified as far as they possibly could be, and to the words "all and every" of the penultimate limitation itself. Particular stress was laid upon the penultimate limitation being followed by the words, "and in default of such issue," and by a devise over in fee, these same words "and in default of such issue," having been used after every other devise of an estate tail to introduce the next limitation. It was said this showed conclusively, at all events, that the penultimate limitation could not have the effect of a devise

in fee, as there was a remainder following upon it in exactly the same words as all the other remainders in the will. And although under this will, which was made before the 31st of December, 1833 (3 & 4 Wm. 4, c. 106, s. 3), the heirs of the testator who took under the ultimate limitation would take by descent and not as devisees, this makes no difference as to the intended effect of the previous limitations which we are now considering.

It will be noticed that every estate tail in the will is followed by the words "and in default of such issue," and it was said that as *these same words followed the penultimate limitation, [350 it is reasonable to read them as embracing the same idea, viz., the failure of estates tail; and it was argued, and we think with great force, that if you once come to the conclusion that the penultimate limitation operates as a devise in tail, it almost follows that successive estates tail were intended, and not so unusual and inconvenient an arrangement as joint estates tail in any number of persons, especially when the testator indicated so clearly his wish that the estate should not be divided.

In answer to the argument that in a will carefully framed, and in which every estate tail was created by the proper technical words, the penultimate limitation alone contained a devise to "issue," it was pointed out that the frequent repetition of the words "in default of such issue" after each devise in tail, showed that the word "issue" was throughout used as embracing all the heirs of the body. The defendant also relied upon the clause already referred to in which the testator expresses his wishes as to the conduct to be pursued by his successors. And it was said that if the testator's mind was directed to the time when the limitations in the will should enable those who took the estate to make fresh settlements, and so prevent the dispersion of the property, he must have intended so far as his own will could do so, to carry this into effect, and the penultimate limitation therefore ought to receive a construction which would carry that into effect.

The language of the clause is very comprehensive, for the hope expressed is that the persons into whose hands the estates shall come, whether by virtue of the will or by means of fines and recoveries, shall be ready to adopt his plan for keeping up the name and family in one person; and this includes all who take estates tail, whether under the will or by means of fines and recoveries. The name and arms clause indicated, it was said, distinctly the same intent; and the clause relating to the muniment box was also referred to as not immaterial, and particularly the language of it, viz., that it should go to the person entitled to the estates from time to time.

It was contended on behalf of the plaintiffs in the first action that the object of the testator was sufficiently carried into effect by the various specific limitations preceding the penultimate one, and 351] that *an adequate effect having been given to that intention, it was unnecessary to employ it in construing that limitation, more especially when the construction contended for was contrary to the proper meaning of the words used; and further, that the clause relating to the conduct of his devisees showed what he wished the first and other tenants in tail to do, and had no reference to the multiplying the tenancies in tail. It was also pointed out that the forfeiture by which the name and arms clause was enforced was inapplicable to any persons who took under the penultimate clause, and also that the clause relating to the muniment box was of little effect, since that it would vest absolutely, being a personal chattel, in the first tenant in tail, for want of the intervention of the usual trustees to make it an heirloom. So far as this part of the argument is concerned, we think there does appear clearly upon the face of the will, and throughout it, an intention on the part of the testator so to limit the estate as to keep the name and estates and family in one person, and that all the devises and particular limitations are introduced as subordinate to, and for the purpose of carrying into effect, this general intent. And having adverted to the arguments on both sides, we do not think it necessary to recapitulate them in favor of this conclusion; but we may say, in reference to those on the other side, that the existence of this intent is not negated by some of the provisions introduced for the purpose of carrying it into effect being imperfect in their operation.

We had brought before us many authorities for the purpose of showing to what extent the courts and the House of Lords had gone in construing particular provisions, so as to carry into effect what has been called the general intent, and how, in some cases, words have been rejected, and a particular intent expressed by them has been sacrificed.

Two of the latest authorities have certainly a strong bearing upon the present case, and may well be noticed: *Jenkins v. Hughes* ⁽¹⁾ and *Byng v. Byng*. ⁽²⁾ In the first there was a clause corresponding with the clause in the present case, expressing the testator's wish as to the conduct of his successors, and in the 352] *second there were clauses corresponding with the name and arms clause and the clause as to the iron chest.

In *Jenkins v. Hughes* ⁽¹⁾ the 9th clause in the will contained the following words: "My express will and desire being that my estates do always descend in the male line."

(1) 8 H. L., 571.

(2) 10 H. L., 171.

The question being whether the great nephew of the testator took an estate tail by force of certain words which, taken by themselves, would have a different operation, Lord Cranworth says: "But the general emphatic direction contained in the 9th clause seems to me to justify us in holding the true construction of the will to be that Thomas took an estate in tail male."

In the other case of *Byng v. Byng* ⁽¹⁾ the will contained a name and arms clause, and also a clause directing that Holbein's portrait of Archbishop Cranmer, and other chattels, should go as heirlooms with the estate. The devise was to A B and his children. As there were several children born at the time of the devise, the effect of the devise, taken by itself, was to make "children" a word of purchase, and to make the children take as joint tenants with A B according to *Wild's Case*. ⁽²⁾

Lord Cranworth's language at p. 181 is remarkable in its application to the present case: "There are two passages in the will which bring me to the conclusion that the testatrix could not have contemplated a joint tenancy among the niece and her children." He then refers to and reasons upon the name and arms clause, and at the end of the paragraph says: "For these reasons I think the direction to take the name and arms tends strongly to show an intention to keep the estates in a single line of enjoyment, and not to divide them among an indefinite number of objects." The other passage alluded to is that making the portrait and other chattels heirlooms, and he refers to that as suggesting arguments of greater weight than the other. Lord Kingsdown, who says that he had given to the case an anxious consideration, having at first had a different impression, refers, at p. 187, to both the above matters as aiding in the construction, and the result was that the word "children" was held to be a word of limitation.

It is not at all necessary in the present case to act upon the rule *of carrying into effect the general intent to the extent to [353 which it has been acted upon in such cases as *Doe d. Blandford v. Applin* ⁽³⁾ and *Doe d. Cock v. Cooper* ⁽⁴⁾, where a particular provision, clearly expressed, has been rejected. The utmost extent to which (if at all) it need be applied is that modified form to which it is limited by Lord Redesdale in *Jesson v. Wright* ⁽⁵⁾ and is approved of by the Court of Queen's Bench in *Doe d. Gallini v. Gallini* ⁽⁶⁾, viz., "that technical words shall have their legal effect, unless from subsequent inconsistent words it is very clear that the testator meant otherwise." And if the words of the penultimate limitation had, by the force of certain decisions, acquired technically the sense of a distribution in joint tenancy,

⁽¹⁾ 10 H. L., 171.
⁽³⁾ 6 Rep., 16 b.

⁽²⁾ 4 T. R., 82.
⁽⁴⁾ 1 East, 229.

⁽⁵⁾ 2 Bligh, 1.
⁽⁶⁾ 5 B. & Ad., 621.

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we should feel justified in departing from that sense when so clearly opposed to the intent of the testator, and giving them any other sense which they would fairly bear. In reality, when we are dealing with a will which is one document, expressing all the intentions of the testator, and which ought, therefore, to be read as a consistent whole, if a question arises as to the effect of a particular clause, the language of which is by possibility susceptible of two meanings, we are naturally and almost irresistibly influenced by the impression derived from the whole will of what the main object and intent of the testator was in making it, assuming, of course, such an object and intent to be apparent upon the face of it; and it is perhaps in this way that the general intent has been so much acted upon.

To come now to the words of the penultimate limitation, "To all and every other the issue of my body." It was contended, on behalf of the plaintiffs, that in general a devise by a testator to his issue gave an estate to all his issue — children, grandchildren, &c.—as joint tenants in fee, and that all came within the devise who were in existence at the time of vesting in possession. Many authorities have been mentioned in which this rule had been followed in cases of personalty: *Davenport v. Hanbury* (1) and other cases collected in Jarman, 3d vol. ii, pp. 89, 90; and to some extent the same rule has been followed in cases of realty: see *Cook v. Cook* (2); and the word "estate" 354] was referred to as incorporated in the devise, so as to carry the fee without any words of limitation. But without relying upon any general intent, it has never been questioned that words ought to be construed by, or along with, the context of which they may be said to form part.

Now, we find in the will before us a long series of devises specifically carrying the estate through all the lines of one part of the testator's issue, each line being followed by the words, "in default of such issue," and upon failure of all those lines there is a devise, "to all and every my other issue," and afterwards, in default of such issue, a devise to his right heirs in fee. We think it would be unreasonable to hold that because the specified male lives had been exhausted, the word "issue" was to be read in a different sense from the sense in which it had been used so often before, and that the whole series of devises were not to be read as consecutive limitations of the same estate.

The ultimate limitation in fee we read as dealing with the same estate at all the previous limitations, viz., the whole estate as one, and the failure of issue is the failure to take the whole, and not several parts.

It was suggested on behalf of the plaintiffs that the ultimate

(1) 8 Ves., 257.

(2) 2 Vern., 545.

limitation might be read, not as a remainder upon the previous estate, but as intended to provide for the case of their being no one to take under all the previous limitations at the testator's death. We think this wholly inadmissible, for, without referring to the state of the testator's family, there are many separate devises to his living children and grandchildren, besides others to their issue unborn.

The ultimate limitation in fee is a great difficulty in the way of the plaintiffs' contention, and the effect of it cannot be got rid of in the way suggested, or, as far as we can see, in any other way.

It was urged by the learned counsel for the plaintiffs that, properly, the word "issue" referred to procreation, not inheritance; the word "heirs" to inheritance, and not procreation; and the words "heirs of the body," to procreation and inheritance. But though this is the primary sense of the words taken by themselves, yet we know frequently the word "heirs," taken with the context, becomes heirs of the body; and the word "issue," when used in a will in connection with previous life estates and with limitations in default of issue generally, [355 refers to inheritance as well as procreation, and is equivalent to heirs of the body.

We see no reason to doubt that the remark upon the case of *King v. Melling* (¹), quoted by Mr. Hayes in his principles for expounding dispositions of real estate (a work frequently referred to in the argument) is applicable to the present case. It is found at the top of Table 3:

"It has been established, ever since the case of *King v. Melling*, that in a will the words "issue of the body" are as strict proper words of limitation as "heirs of the body," and equally give an estate tail in lands legally devised (per Lord Hardwicke). We see no reason why the words must receive a different meaning in a devise by the testator to the issue of his own body from that which they would receive in a devise to the issue of the body of another person."

In the present will the use of the words "in default of such issue" throughout, after a devise to the heirs male of the several tenants for life, and the form of the penultimate devise followed by the devise over in default of issue, justifies us in reading the word "issue," in that devise, as equivalent to "heirs of my body."

We do not think the words "all and every," in themselves, when applied to issue, necessarily import distribution. In *Surtess v. Surtess* (²), quoted by the learned counsel for the plaintiffs, the words "to the use of every son of JS, living at the

(¹) 1 Vent., 225, 232.

(²) Law Rep., 12 Eq., 400.

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death of the eldest son of J S, or born during the testator's lifetime," were held to give to each son a separate interest. But the words "son or sons" (excluding the next generation) are very different from the word "issue" which takes in all descendants, and the naming a time when the objects of the gift were to be ascertained to the exclusion of others coming within the description, seems to refer to a separate interest in each of them.

On the other hand, in *Cradock v. Cradock* ⁽¹⁾, the words "all and every" occurred. The words, after other devises in tail, were "and in default of such issue to the third and all and every other the son and sons of A, and the heirs male of such son and sons, and in default of such issue to the testator's right 356] heirs." It was *held these words gave the third and other sons estates in succession in tail male, and that the third son took the entirety.

No authority was referred to in which the words "all and every the issue," coupled with any context such as we have here and applied to real estate, had been held to make a joint tenancy either in fee or in tail.

Reading the penultimate limitation, then, as a devise to the heirs of the body of the testator, and for the present supposing the case not to be complicated by the addition of the word "other," we think the case would be governed by *Mandeville's Case* ⁽²⁾, and that the effect of the devise would be that there would be a remainder under which all the heirs of the body of the testator would take in the same manner as if the testator had been tenant in tail, and the heirs of his body had taken by succession from him.

The case is given in Co. Litt., p. 26 b. The section of Littleton deals with such a case as well as the commentary. The text is, s. 30: "Also if a man hath issue a son, and dyeth, and land be given to the son and to the heirs of the body of his father begotten, this is a good entail, and yet the father was dead at the time of the gift, and there be many other estates in the tail by the equity of the said statute which be not here specified."

The statute referred to is, of course, the Statute of Westminster 2 (de donis). The Commentary gives *Mandeville's Case* ⁽²⁾: "John de Mandeville died leaving a wife, Roberge, and issue Robert and Maude. Michael de Mandeville gave certain lands to Roberge and to the heirs of John de M., on her body begotten, and it was adjudged that Roberge had an estate for life and the fee tail vested in Robert, and that when he died without issue Maude, the daughter, was heir of the body of her father per formam doni."

⁽¹⁾ 4 Jur., (N.S.), 626.

⁽²⁾ Co. Litt., 26 b.

This case has been the subject of much comment. It is discussed by Fearn (Contingent Remainders, p. 82), where he says that Hale called it, with his emphatic accuracy, a quasi entail; and more fully in Butler's note, who calls it an anomalous case. There are some excellent remarks upon it of Vice-Chancellor Kindersley, in *Wright v. Vernon*.⁽¹⁾ It was acted upon in that case, and also in the same case, on appeal, *Vernon v. Wright*⁽²⁾, and is undoubted law. If it is objected that [357 something like a fiction is introduced, it certainly has the merit (as pointed out by the Vice-Chancellor in the case referred to) of carrying into effect the intention of the testator that all the heirs of the body should be included.

In the case referred to the devise was to the heirs of the body of a third person deceased, but we think the same rule applicable to a devise to the heirs of the body of the testator, which can only take effect upon his death. The learned counsel for the plaintiffs did not dispute that it was so applicable, and so that if there was a devise to A and the heirs of his body, and upon failure of such issue to the heirs of the body of the testator, and in default of such issue to the testator's right heirs, there would at the death of the testator be a vested estate tail in remainder upon failure of A's issue in the heirs of the body of the testator descendible as in *Mandeville's Case* ⁽³⁾, with a remainder in the testator's heirs general.

We have only then to consider how far the additional word "other" affects the meaning and makes the rule in *Mandeville's Case* ⁽³⁾ inapplicable. And if the necessary meaning of that word was to exclude out of the operation of the penultimate limitation any part of the issue of the body of the testator, the rule in *Mandeville's Case* ⁽³⁾ would not be applicable, or rather could not be made applicable, by qualifying the strict and proper meaning of a word, as was done in *Jenkins v. Hughes* ⁽⁴⁾ and the other cases referred to, in order to carry into effect the clear intent of the limitation that all the issue of his body should be exhausted before the estates went over to his collateral heirs.

But it does not appear to us that the word "other" has any effect by way of exclusion at all, and for this simple reason, that there is nothing to exclude. The penultimate limitation for the benefit of "all and every other the issue of the body" is only to come into operation when the rest of the issue not comprehended in the word "other" have been exhausted and extinguished.

The distinct effect of the word other may be illustrated thus: If the testator's issue consisted of two classes, A and B, and he was to dispose of two estates, and give the first to class A in tail

⁽¹⁾ 2 Drew., 489.

⁽²⁾ 7 H. L., 60.

⁽³⁾ Co. Litt., 26 b.

⁽⁴⁾ 8 H. L., 571.

and the second to all and every the other issue (which would be 358] *class B), in that case both devises would come into operation at the same time and both estates be enjoyed at the same time by A and by the other issue, and A would be excluded from the enjoyment of the second estate, and the other issue from the enjoyment of the first.

In that case the word "other" would forever exclude class A from the enjoyment of the second estate.

But it is different if there is one estate to be enjoyed in succession by A, and by the other issue, and only by the other issue, on the extinguishment of A. Thus if the estate be given to class A in tail male, and upon failure of issue to the other issue of the testator, it is obvious that the word "other" does not operate to exclude class A from the enjoyment of the estate which has already been enjoyed by class A until its extinguishment, but its only effect is to include the other issue. The rule, "*Expressio unius est exclusio alterius*," therefore, does not apply when the other has been included in the gift before. In short, in the case put of two classes of the issue A and B, and a devise to A, and upon the extinguishment of A to B, the effect is the same whether the gift over be to B or to the whole issue A and B, A being extinguished. We are speaking of course of the effect so far as the actual enjoyment of the estate is concerned, which is what the testator is considering, and not of the legal effect, which may be different by reason of the law regarding estates in remainder as vested and capable of being dealt with in the same manner as estates in possession. It need hardly be added that the way in which the law may operate upon estates by enabling entails to be cut off, or in other respects, is to be disregarded in construing wills, for which many authorities were cited at the bar.

It was noticed that in the common use of the word "other" it has two meanings, one being "different from," corresponding with the French "*autre*," and the other being "additional" or "in addition to." The latter is the proper sense here, and the real meaning of the words "other issue of my body" is to add to the specified issue all that which remains, and so comprise and include it in the limitation. It may appear a paradox to say that "all my other issue" has the same meaning as "all my issue," but in reality the two things are the same when there is 359] no issue existing *except the other issue, and in that event both expressions have the same meaning.

The learned counsel for the defendant put by way of illustration a case which raises really the same question as the present, but in a simpler form, and clear of the peculiarity of *Mundeville's Case* (¹).

(¹) Co. Litt., 26 b.

A devise to A for life and to his first son in tail male, and in default of all other issue of A, to a stranger in fee. Would it not be clear in that case that the estate was not to go over except upon a failure of all the issue of A? and would the word "other" be considered sufficiently definite and important in its meaning to prevent an estate in tail general in remainder in A, after failure of all the male issue of A's eldest son, upon the authority of *Stanley v. Lennard* ⁽¹⁾ (which is the same case without the word "other"), and a class of cases to the same effect: *Langley v. Baldwin* ⁽²⁾; *Doe d. Bean v. Halley* ⁽³⁾; *Purker v. Tootal* ⁽⁴⁾? We think it would not, and that the word "other" is not a governing word in such a limitation.

There are some authorities to this effect, with which the learning and industry of the learned counsel for the defendant supplied us, where the word "other" was used with a similar context.

The first was that of *James v. Richardson* ⁽⁵⁾. It should be noticed that the report is not of the judgment of the Court, but of Pollexfen's own argument, which seems, however, to have been adopted by the King's Bench, and afterwards by the House of Lords.

The case was a devise of an estate to a trustee during the life of A in trust to permit A to receive the rents, and the will provided, "after the death of A, I devise the estate to the heirs male of the body of A now living, and to such other heirs, males and females, as he shall hereafter happen to have of his body;" and for want of such heirs there was a devise over. A had an eldest and only son, George, alive at the making of the will and at the death of the testator. The question was, what estate George took, and it was considered he took an estate tail by force of the words, "such other heirs male and female as he shall have of his *body. Now George was the heir of A, [360 and could not take if the word "other" had the effect of excluding him, because he had been named before. The argument at p. 462 is, "the word 'other' does not exclude George; it only provides for the other heirs — males that should be of another sort." And at page 463 it is said, "If lands be given to A for life, remainder to heirs male of the body of B, remainder to the other heirs of B;" in this case the heir of B takes two estates, one as "heir male" and the other as "heir general." But it is obvious he could not do this if the word "other" did not include him, though he had been named before. No doubt what has been quoted is only the argument of Pollexfen, but if it be correct it is strictly applicable to the present

⁽¹⁾ 1 Eden, 87.

⁽²⁾ 1 Eq. Abr., 185.

⁽³⁾ 8 T. R., 5.

⁽⁴⁾ 11 H. L., 143.

⁽⁵⁾ Pollexfen, p. 457.

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case, and shows that under the present will the second baronet took two estates under the will of the first baronet, an immediate estate for life, and an estate tail general in remainder upon failure of the preceding limitation. Another authority was the case of *Burchett v. Durdant* (¹). In that case the same will appears to have come in question, and it is said the matter was three times argued in the Exchequer Chamber; and the third resolution is to the effect that George Durdant took an estate tail by force of the words, "and to such other heirs, male and female, as he (Robert Durdant) should have of his body." This is to the same effect as Pollexfen's argument, and it was affirmed in the house of Lords; and the word "other" could not have the effect of excluding George, who was the heir male previously named.

We were also referred to a passage in Preston on Estates (vol. ii. p. 506), to show what his opinion was of the effect of the word "other" in a limitation similar to the present. He was a man of undoubted eminence in his branch of the profession, and of great experience in the drawing of deeds and wills, and a good authority as to the meaning of particular words.

The case put by him is of a gift to "R. and K. his wife, and their heirs; to the other heirs of R., if the heirs of R. and K. should die without heirs of themselves." The remark of the writer upon this case is, "That two estates were limited, one by a special entail (that is, to the heirs of the body of R. and K.), the other a fee simple by the words 'other heirs of R.,' for the 361] donee had declared that *the order of succession should, in the first place, be regulated by a reference to the joint heirs of husband and wife, and extend to and include in a secondary consideration, and under a more remote gift, *all* the heirs of the husband."

Thus the words "other heirs" include all heirs, and do not exclude the eldest son, though he would come within the previous limitation.

We will now recapitulate, in this rather complicated case, the conclusions upon the various arguments submitted to us, upon which our judgment is founded, for the reasons which have been already given.

First. The words "issue of my body" in the penultimate limitation, are to be read in the same sense as "heirs of my body."

Secondly. Having regard to the context and the whole will, we cannot read the devise "to the issue of my body" as having the effect which in an ordinary will taken by itself it might have, viz, of giving the estate, per capita, in joint tenancy

(¹) 2 Vent., 311.

among all who came within the class at the time of vesting in possession.

Thirdly. The words "all and every" do not import that all and every are to take at the same time, but are well satisfied by all taking in succession.

Fourthly. The word "other" is not to be read in the strict sense of intending to exclude those coming within the class who have been provided for before and are supposed to have failed, but rather to complete a provision for all the issue, so as to make the estates go over by force of the words at the end of the penultimate limitation, "in default of such issue," only upon failure of all the issue of the testator. And the result is that by virtue of the penultimate limitation there was, at the death of the testator, a vested remainder in the heirs of his body in tail general, to which the second baronet then became entitled. That this remainder descended to the third baronet, the grandson, and that as he was also tenant for life in possession he was qualified to execute a disentailing deed, so as to acquire the absolute disposition of the property subject to all the estates preceding the penultimate limitation.

It is only necessary to add that this estate tail, if suffered to continue until it takes effect in possession, exactly and completely gives effect to the words of the penultimate limitation, [362 because upon failure of all the issue named in the particular limitations the persons who would take under the penultimate limitation, and the only persons who would take under it, are all and every other the issue of the body of the testator. And this is a great proof of the soundness of the conclusion, notwithstanding the objections made to the mode of arriving at it, which we have already considered.

This conclusion agrees with the recital in the disentailing deed, which was no doubt made upon mature consideration. It was admitted that the disentailing deed was properly executed and effectual in law, if the grandson was qualified to make it.

The claim of the plaintiffs, if without the disentailing deed they would have had any claim, is therefore barred, and the defendant, who claims under the disentailing deed, is entitled to the judgment of the court.

Having come to the conclusion in the first action that the defendant is, upon the facts stated, entitled to the property, it follows that in the other actions, as the facts are the same, the defendant is also entitled to judgment.

But it seems proper to state the objections to the title set up by the plaintiffs in these actions.

In the second action, that of *Roach v. Blake*, the plaintiff is Eleanor Ann Roach, the only surviving daughter of Eleanor Ann who was herself the last surviving child of the second

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baronet, and the last tenant in tail under the specific limitations of the will, She was the heir in tail general of the body of the testator at the time when the penultimate limitation took effect in possession.

The Solicitor General, who appeared for her, contended that she was therefore the person entitled. His argument was that the penultimate limitation was a contingent remainder, that is, contingent as to the person who was to take under it until the happening of the event, and of course his whole argument was based upon the introduction of the word "other," which caused the contingency. In addition to the answer already given, by attributing the proper sense to the word "other," and to another objection, viz., that this reading introduces a contingent remainder after so many limitations, when another reading introduces a vested remainder (always so much preferred because 363] it enables the *property to be dealt with) in addition to these objections, another objection is that though this reading provides one of the issue to take when the event happens, it makes no provision for the succession of all and every the other issue. And accordingly the Solicitor General relied (as he was obliged to do) upon *Mandeville's Case* (1) and contended that all and every the other issue might succeed as upon a supposed entail or quasi entail in the testator to himself and the other heirs of his body (excluding certain lines of descent which would include the real heirs of his body). Cases of limited entail were put, such as the entail upon the Electress Sophia of Hanover, and the heirs of her body being Protestants, or upon a man and the heirs of his body, tenants of the manor of Dale. It is unnecessary to enlarge upon the obvious distinction between such cases) where a condition is imposed upon a person who is the real heir of the body) and the present; such a distinction might be of importance in the case of a grant or devise to the ancestor as well as to the heirs of his body. But we should certainly not extend *Mandeville's Case* (1) to such remote and contingent interests as we are now considering; or suppose the testator to be quasi tenant in tail of an estate descendible not to the heirs of his body but to some person who might at a remote period, and upon the happening of a certain event, fill the character of heir of his body, and upon the failure of his issue to some other heir of the body not easily ascertained. In the case put, the heir of the body who took as by descent, would take an entirely different estate from that of the ancestor from whom he is supposed to inherit.

In the third action, *Clennell v. Blake*, the claimant is Percival Fenwick Clennell. His mother was the survivor of all the issue.

(1) Co. Litt., 26 b.

of the testator living at his death (other than those included in the particular limitation) and he claims either the entirety as the heir of the survivor of the issue living at the death, or his share in case the other issue are allowed to come in. His case as regards the claim to the entirety differs from the first case only in this, that he insists the distribution ought to be made among the issue at the death of the testator, and as to the share claimed, his case is the same as the first. The same objections apply quite as strongly. Distribution among the issue per capita is *equally against the language and intent of the will, [364 whether finally made at the death of the testator or modified by the introduction of other issue.

In the fourth case, *Reed v. Blake*, the claimant is Francis Reed, and he claims the entirety as heir in tail of the testator at his death, all those being excluded who came within the particular limitations.

He relies upon the exclusive effect of the word "other" and the distinction between his case and the second (that of Roach) is that he claims as upon a remainder vested at the death of the testator, whereas in Roach's case the remainder is contingent as to the person to take. The same objections apply as to Roach's case, except that founded upon the construction making the remainder contingent.

It provides one person to take under the limitation, but makes no provision for all and every the other issue, except by the eccentric application of *Mandeville's Case* (¹). The following would be one of the consequences of the construction contended for by this plaintiff. If the third baronet (the grandson) had left one child, a daughter, surviving him, that daughter would clearly have been excluded from all the particular limitations. And though upon the extinction of all the male lines she would be the proper representative of the family, she would be excluded by the grandson of her great great-aunt Sarah Reed, whose issue the testator purposely excluded in the enumeration of all who were to take.

According to the construction which we put upon the will, the estate would have come to her in a regular course of descent as tenant in tail in the events which have happened.

There was a fifth case mentioned upon the argument in which the plaintiffs are the same as in the first, and which is only a different action because it is brought in respect of other property. In that case also judgment will be for the defendant.

BRAMWELL, B. I concur that our judgment should be for the defendant, and I agree in all the reasoning of my brother Cleasby, except in his dealing with the word "other" in the

(¹) Co. Lit., 26 b.

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penultimate clause. I think the testator did not intend, and has 365] not expressed *the intention, that any of those issue of his body before named should take an additional estate to those he had already given them. I do not think he had so improbable a thing in view. I think he meant that for default of such issue as named, the daughters of the sons of his eldest grandson, on their default the daughters of his eldest grandson, then the daughters of the sons of his second grandson, then the daughters of his second grandson, then in the same way as to the third, fourth, and other grandsons, then the daughters of granddaughters should take in succession as purchasers, and so on according to heirship to him. This would give the estate to Mrs. Roach. But this intention is not expressed sufficiently to be carried into execution, and the only way to accomplish the testator's general or governing intent to provide for the issue of his body, is to construe the will as proposed by my brother Cleasby. I therefore concur in his judgment, and the more readily that if the penultimate clause is not interpreted as he proposes, it is unmeaning, in which case also the defendant is entitled to judgment.

Judgment for the defendant.

Attorney for plaintiffs: *Jennings.*

Attorneys for defendant: *Gray, Johnston, & Mounsey.*

June 11, 1872.

379] *EADON and others v. JEFFCOCK and others.

[Law Reports, 7 Exchequer, 379].

Mines — Injury to Surface — Subsidence.

In 1840 a bed of coal, called the High Hazle Bed, was demised, with working powers, to persons from whom the defendants took by assignment. The lessees were to pay a minimum rent of 200*l.* as for 2*a.* 1*r.* 16*p.*, and a further yearly rent at the rate of 85*l.* per acre for coal actually got beyond the 2*a.* 1*r.* 16*p.*, "including all ribs and pillars left in working the said coal, *except* the pillars for the support of the shafts, the pillars between the deep and counter level, the pillars all round the estate, and the pillars under the homestead and farm buildings." These pillars, of specified dimensions, the lessees bound themselves to leave "during the whole of the term," and they also covenanted to work the mines "according to the best of their judgment, skill, and discretion, in a good and workmanlike manner."

In 1857 the assignee of the lessor conveyed part of the land within which the mine lay to persons from whom the plaintiffs took with notice, reserving to the grantor the High Hazle Bed (except a small portion specified), and "the mines, veins, and bed of coal, fire-clay, and other clay, stone and other minerals lying under the said bed called the High Hazle Bed," with powers to the grantor, his heirs and assigns, and his and their tenants and lessees, to be exercised "from and after the expiration of the term" for "carrying on the works of the mine, and getting and carrying away the said fire-clay, &c.," so reserved; and also reserving to the grantor the coal rent under the lease of 1840, with the necessary powers. Provision was made for rent for land used or occupied by the grantor for the purposes of the mine, and for compensation for buildings required or removed for that purpose, and for surface damage to the land; but it was specially

provided that the grantor, his heirs or assigns, tenants or lessees, should not be liable for any damage caused to buildings which should thereafter be erected on the land conveyed, by the sinking of the land through mining operations in getting the "coal, clay, stone and other minerals hereby excepted and removed."

The pillars specified in the lease of 1840 were left; and the defendants worked according to the usual course of mining in the district; but their workings caused a subsidence, which injured the land of the plaintiffs and buildings erected since 1857. The land would have subsided without the buildings.

Held (by Martin and Cleasby, BB.; Bramwell, B., doubting), that, it appearing by the lease of 1840 to be the intention of the parties that all the coal should be removed, except the specified pillars, and the defendants having worked the mine in a proper manner, they were not liable for the injury.

By Bramwell, B., that so far as concerned the houses, the proviso in the conveyance of 1857 protected the defendants from liability, notwithstanding that the lease under which they held was antecedent to that deed.

Dugdale v. Robertson (3 K. & J., 695), and *Taylor v. Shafto* (8 B. & S. 228), commented on.

SPECIAL CASE stated in an action brought to recover damages for injury done to land and houses of the plaintiffs, situated at *Carbrook, near Sheffield, by subsidence caused by the [380 mining operations of the defendants.

The defendants were assignees of a lease, dated the 24th of June, 1840, by which T. H. S. Sotheron, being seised in fee of the Carbrook estate, demised to B. Hornsfield, J. Wilson, W. Jeffcock, and T. Dunn, for a term of thirty-one years from the preceding 1st of June, the High Hazle Bed of coal, lying under lands forming part of the estate, and containing 108a. 3r. 1p.; with liberty to enter upon and occupy the said lands so far as necessary for carrying on the works of the mine, or exercising the powers granted by the lease; giving notice and making compensation, as therein mentioned, "for all injury or damage to be done to buildings, and to the corn or other crops then standing or growing thereon; and with liberty to open, sink, dig, &c., any pits, shafts, adits, &c., in and upon the said lands and hereditaments, and on any part thereof (with certain exception of garden ground), "doing thereby as little damage as may be." And to win, get, and dispose of "all that the said mine or bed of coal," and to make and dispose of coke; and with liberty to raise clay, brick earth, loam, sand, fire-clay, or stone, in any convenient part or parts of the lands, and to make the same into bricks, &c., for the buildings and works of the mine, and to erect engines, huts, and other erections and machines, and generally to do all other acts necessary for working the mine. To have and hold the said mines, &c., for the term of thirty-one years, "yielding and paying therefor, yearly and every year during the said term of thirty-one years, unto the said T. H. S. Sotheron, his heirs and assigns, the certain yearly rent or sum of 200*l.*, as for 2a. 1r. 16*p.* of the said mine or bed of coal, by two half-yearly payments in each year, on the 1st day of December and the 1st day of June, without any deduction for taxes or

otherwise, the first payment thereof to be made on the 1st day of December next; the same rent to be payable whether the said B. Hornsfield, J. Wilson, W. Jeffcock, and T. Dunn, their executors, administrators or assigns, shall get that quantity of coal or not; and also yielding and paying to the said T. H. S. Sotheron, his heirs or assigns (over and above the said certain yearly rent of 200*l.*) the sum of 85*l.* for every statute acre, and so in proportion for any greater or less quantity than a statute 381] acre of the said mine or bed of coal *hereinbefore demised, which shall be got in each year of the said term over and above the said 2*a.* 1*r.* 16*p.*, including all ribs and pillars left in working the said coal, except the pillars for the support of the shafts, the pillars between the deep and counter level, the pillars all round the estate, and the pillars under the homestead and farm buildings hereinafter severally mentioned; and also yielding and paying yearly rent for surface land occupied under the powers of the lease, at the rate of 4*l.* an acre; and, on the last day but one of the term, for surface land not then levelled fit for tillage, a sum at the rate of 30*l.* an acre.

It was provided that rent should be remitted in the event of fault or failure of coal occurring; "and further, that in working the said mines the following pillars shall be left by the said E. Hornsfield, J. Wilson, W. Jeffcock, and T. Dunn, their executors, &c., during the whole of the said term hereby demised in the said mine (that is to say), a pillar for the support of the shafts, a pillar of four yards in breadth at the least between the deep and counter level of the said mines, a pillar of ten yards in breadth at least all around the estate, and a pillar of one acre at least under the homestead and farm buildings."

The lease contained powers to remove machinery, &c., and covenants by the lessees to pay rent, rates, and taxes, to fence the lands used by them, to work the mines "according to the best of their judgment, skill, and discretion, in a good and workmanlike manner," and to sink the engine shafts as therein mentioned, to fill up and level (on request) useless shafts, to level the grounds adjacent to shafts or connected therewith, fit for tillage, according to the custom of the country, and to allow inspection; and further, that the lessees, &c., would from time to time, upon demand, "pay the several occupiers and tenants for the time being of the said lands under which said lands the mines hereby demised are situated, reasonable satisfaction for any damage that may be caused or occasioned on their respective lands or the crops growing thereupon, by working the said mine, or carrying or not carrying away the produce thereof, or any materials to or from the said premises, the amount of such payment or satisfaction in case of dispute, to be settled by reference to arbitration."

The lease also contained a covenant against assignment, powers *of distress and re-entry for non-payment of rent, [382 arbitration clauses and the usual lessor's covenants for title.

The plaintiffs derived title as follows:

By a deed of the 9th of June, 1847, T. H. S. Sotheron conveyed to Samuel Roberts the whole of the Carbrook Hall estate, with the mines and minerals under the same, subject to the lease of 1840.

By a deed of the 27th of April, 1857, made between, 1. S. Roberts, 2. H. Briggs, and 3. H. Briggs, G. Adsett, J. Williamson, and W. Siddall (after reciting the conveyance of 1847, and the lease of 1840), S. Roberts appointed and conveyed to the parties of the third part, their heirs and assigns, Carbrook Hall and certain pieces of land, containing 52*a.* 1*r.* 94*p.*, and forming part of the Carbrook Hall estate, together with (inter alia) all "mines and minerals other than the veins and beds of coal, clay, and other minerals hereinafter excepted," and all rights, &c., "save and except as hereinafter reserved;" reserving to the lord of the manor of Attercliffe all rights to mines, ores, minerals, or coal, in or under certain lands allotted under an Inclosure Act. "And also excepting and reserving to the said S. Roberts, his heirs and assigns, the said mine, vein, bed, or stratum of coal called the High Hazle Bed, part of which is demised by the said recited indenture of lease of the 24th of June, 1840, except out of this exception and reservation so much thereof as is under the part colored dark green on the said plan, and which part contains one acre, or thereabouts; and also, excepting and reserving the mines, veins, and beds of coal, fire-clay, and other clay, stone, and other minerals, lying under the said bed, called the High Hazle Bed, as (sic) are within and under the said closes and other hereditaments hereinbefore described granted and conveyed; with liberty to the said S. Roberts, his heirs and assigns, and his and their tenants and lessees, miners, &c., "from and after the expiration of the term" granted by the lease of 1840, to enter upon and occupy so much of the lands "under which the excepted coals and minerals so reserved to the said S. Roberts" lay, as might be "necessary for the carrying on the works of the said mines, and getting and carrying away the fire-clay and other clay, stone and other minerals, lying under the said bed of coal called the High Hazle Bed, or for exercising all or *any of the powers and authorities to [383 him or them excepted or reserved by these presents;" and also, after the expiration of the said term, to open pits, &c., in and upon the lands "under which the said coal and minerals so reserved" lay, doing thereby as little damage as may be; and to get and dispose of "all the said hereinbefore excepted mines,

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veins, beds, or stratum of coal, fire-clay, and other clay, stone, and other minerals under the said bed of coal called the High Hazle Bed ;" and to set up such engines, &c., on the lands under which the beds of coal, &c., so reserved lay, as might be necessary for getting "so much of the veins or beds of coal, fire-clay and other clay, stones, and other minerals as are hereinbefore reserved to the said S. Roberts ;" and to do all acts necessary for bringing, placing, &c., all such coal, fire-clay, and other clay, stone, and other minerals, as is hereinbefore reserved to the said S. Roberts, &c. ; the said S. Roberts, his heirs and assigns, well and truly performing, fulfilling, and keeping the several covenants and agreements hereinafter on his and their part contained with reference to the said beds of coal and the several powers, liberties, privileges, and authorities in and by these presents excepted, reserved, or given."

To have and to hold the said hereditaments, with the appurtenances (except and reserved as aforesaid, and also reserving to the said S. Roberts, his heirs and assigns the coal-rent reserved by the said lease, and also all powers, privileges, and remedies for the recovery thereof, as also all other powers, privileges, and authorities which the said S. Roberts, his heirs or assigns, would have been entitled to exercise or carry into execution with reference to the said lease, in case these presents had not been executed, and subject to the lease) unto H. Briggs, G. Adsett, J. Williamson, and W. Siddall, their heirs and assigns.

Covenants by S. Roberts that he had good right to convey, "subject and reserved as aforesaid ;" for quiet enjoyment, "except in reference to the said lease, and the beds of coal, fire-clay, and other clay, stone, and other minerals, rights, liberties, and privileges hereby excepted or reserved ;" free from incumbrances and for further assurance ; and further, that, except under the powers contained in, or reserved with reference to, the lease of 1840, he, his heirs or assigns, or his or their lessee 384] or lessees, miners, &c., *would not enter upon the land under which the beds of coal, &c., so reserved lay, without giving one month's notice ; and that he, his heirs and assigns, would make reasonable satisfaction and compensation to H. Briggs, G. Adsett, J. Williamson, and W. Siddall, their heirs and assigns, and to the tenants or occupiers for the time being of the lands for all injury or damage to be done to buildings then erected or which might thereafter be erected on the land conveyed, which might be required, taken down, or removed by S. Roberts, his heirs and assigns, or his or their tenants, or lessees, for the purpose of opening, &c., any pits, &c., as also for all injury or damage to the corn and other crops for the time

being standing, growing, or being thereon, by carrying on the works of the mines, getting the said fire-clay and other clay, stone, and other minerals, or by exercising all or any of the powers and authorities thereby excepted, reserved, or given, except as aftermentioned.

"Provided, nevertheless, and it is hereby expressly agreed and declared by and between the parties to these presents, that the said S. Roberts, his heirs or assigns, tenants or lessees, shall not be liable or responsible to the said H. Briggs, G. Adsett, J. Williamson, and W. Siddall, their heirs or assigns, tenants or lessees, or to any other person or persons whomsoever, for any damage, injury, or loss which may be caused, occasioned, or sustained to any dwelling house or dwelling houses, or other erections or buildings, which shall hereafter be erected or built upon the land or ground and hereditaments hereby conveyed or intended so to be, or upon any part or parts thereof, by or in consequence, or which can be attributed or attributable to the settling, sinking, or lowering of the said land or ground and hereditaments, or any part or parts thereof, which may be caused or occasioned by the opening, sinking, driving, working, and making any pits, shafts, or other works, or to the winning, getting, working, and raising the coal, clay, stone, and other minerals hereby excepted and reserved." There were further covenants by Roberts for payment of surface rent, restoring the surface, payment of taxes, fencing of works, filling up and levelling shafts, &c., similar to those contained in the lease of 1840, with powers of distress to H. Briggs, &c., and arbitration clauses.

*By a deed of the 9th of April, 1860, H. Briggs, G. [385 Adsett, J. Williamson, and W. Siddall (and their mortgagees) conveyed to Charles Robinson a portion of the land included in the deed of 1857; and on the 8th of November, 1865, Charles Robinson conveyed a portion of the land so conveyed to him to Robert White.

By building leases, dated respectively the 8th of May, 1866, and the 5th of September, 1866, Robert White demised to J. T. Hall certain portions of the land so conveyed to him for terms of 800 years; and by deeds, dated respectively the 17th of August, 1866, and the 11th of October, 1866, these leases were mortgaged by J. T. Hall to the plaintiffs. The lands and buildings comprised in these leases were the land and buildings in question.

The plaintiffs, and the several persons through whom they derived title to the land and houses in question, took with notice of the terms of the lease of 1840 and the conveyance of 1857.

The bed of coal demised by the lease of 1840, and which lay

underneath the land and houses of the plaintiffs, was worked from the date of the lease, and the pillars stipulated for in the lease were and are left as thereby provided; but these pillars are not near the land and houses of the plaintiffs.

The lease became vested in the defendants in 1868, and they continued to work the demised coal under the powers contained in it. Between the 1st of May, 1868, and the commencement of the action they extended their workings under and near to the land and buildings of the plaintiffs, and by reason of such workings the land and buildings subsided and sunk, whereby the plaintiffs sustained damage.

There was nothing in the course adopted by the defendants in their workings contrary to the usual course of mining in use in the district. It would have been possible to leave pillars which would have supported the surface; but in that event the coal forming such pillars and supports must have been paid for by the defendants under the lease, and would have been lost to them.

When the lease was granted in 1840, the land under which the demised coal lay was agricultural land, without any buildings, except the homestead and farm buildings mentioned in the lease, 386] *none of which stood on the land now belonging to the plaintiffs. The buildings now on the plaintiffs' land were erected in 1865. The land would have subsided and sunk without the weight of the buildings.

The questions for the opinion of the Court were: 1. Are the defendants liable to the plaintiffs for any damages caused by the said subsidence? 2. If the defendants are so liable, are they liable for any damages caused by the subsidence to the houses of the plaintiffs? The damages (if judgment should be for the plaintiffs) to be assessed by an arbitrator.

Feb. 7. *Field, Q.C.* (*Gainsford Bruce* with him), for the plaintiffs, contended that the case fell within the rule established by *Humphries v. Brogden* ⁽¹⁾; *Smart v. Morton* ⁽²⁾; *Roberts v. Haines* ⁽³⁾; *Brown v. Robins* ⁽⁴⁾; *Stroyan v. Knowles* ⁽⁵⁾; *Rowbotham v. Wilson* ⁽⁶⁾; *Dugdale v. Robertson* ⁽⁷⁾; *Proud v. Bates* ⁽⁸⁾; and *Duke of Buccleuch v. Wakefield* ⁽⁹⁾; that the owner of mines must work them so as to do no damage to the owner of the surface; and that there were no such indications of a contrary intention in the lease of 1840, as were, in *Taylor v. Shaft* ⁽¹⁰⁾, held to modify the operation of that rule. They also contended that the pro-

⁽¹⁾ 12 Q. B., 739; 20 L. J. (Q. B.), 10.

⁽²⁾ 8 H. L. C., 348; 30 L. J. (Q. B.), 49.

⁽³⁾ 5 E. & B., 30; 24 L. J. (Q. B.), 260.

⁽⁴⁾ 3 K. & J., 695.

⁽⁵⁾ 6 E. & B., 643; 7 E. & B., 625; 25

⁽⁶⁾ 34 L. J. (Ch.), 406.

L. J. (Q. B.), 353.

⁽⁷⁾ Law Rep., 4 Eq., 613; Law Rep., 4

⁽⁸⁾ 4 H. & N., 186; 23 L. J. (Ex.), 250.

H. L., 377.

⁽⁹⁾ 6 H. & N., 454; 30 L. J. (Ex.), 102.

⁽¹⁰⁾ 8 B. & S., 228.

viso against liability for damage to the surface contained in the deed of 1857 could not affect the liability of the defendants, who claimed under the earlier lease of 1840.

Manisty, Q.C. (Kemplay and Gould with him), for the defendants, contended that the intention of the parties to the lease of 1840, was that all the coal should be got, except the specified pillars; and that under those circumstances the defendants, working in a proper and customary way, and leaving the specified supports, were not liable for damage caused thereby: *Taylor v. Shafto* ⁽¹⁾; and they also contended that the effect of the proviso in the deed of 1857, was that the purchasers under that deed took the land *without the right support, so far as con- [387
cerned the excepted mines: *Rowbotham v. Wilson* ⁽¹⁾.

Gainsford Bruce, in reply.

Cur. adv. vult.

June 11. The following judgments were delivered:

CLEASBY, B. This case was argued before my brother Martin and Bramwell and myself, and the judgment which I am about to read is that of my brother Martin and myself.

The question in this case is, whether the plaintiffs can recover against the defendants for damages to their houses or their land, caused by the subsidence of the latter. It must be taken as a fact in the case that the subsidence was caused by the working of the coal mines underneath by the defendants.

When the property in the soil and in the minerals underneath belongs to different persons, the general rule is, no doubt, that each must use his property so as not to injure that of the other. It does not appear to be well settled what the exact nature of the right of the owner of the soil to the support of the subjacent or adjacent minerals is. Lord Wensleydale says, in *Rowbotham v. Wilson* ⁽²⁾, "Whether the right to support given by the land below to the land of the owner of the surface when the strata belong to different persons properly is, to be called an easement, as it is by Mr. Gale in his excellent *Treatise on Easements*, 'a natural easement,' or, whether it is to be termed a right ex jure naturæ to that support, or whether the owner of the surface has merely a right to enjoy his own land in its natural state and condition with a right of action against the owner of the land adjoining or subjacent when the act of his neighbor does him an injury, are questions immaterial to the decision of this case, though the last proposition appears to be fully established by the judgment of the Court of Exchequer Chamber in *Bonomi v. Backhouse*" ⁽³⁾.

⁽¹⁾ 8 B. & S., 228.

⁽²⁾ 8 H. L. C., 348; 30 L. J. (Q. B.), 49.

⁽³⁾ 8 H. L. C., at p. 359; 30 L. J. (Q. B.),

⁽⁴⁾ E. B. & E., 646; 28 L. J. (Q. B.),

878; affirmed in the House of Lords,

Backhouse v. Bonomi, 9 H. L. C., 503; 34 L. J. (Q. B.), 181.

In many of the cases the analogy of the owners of the separate flats or stories of a house is referred to, and it places the 388] matter in *a clear light where there has been a separate ownership of the two without its being known how they became separated, or where there has been a conveyance of the land with a reservation, or rather exception, of the mines. And in such cases we must look to those rights which by law are annexed to the property in each.

But it appears to us that this analogy does not exist where the transaction is an ordinary mining lease, which is a contract entered into between the owner of both surface and minerals, and a lessee or a licensee for the purpose of removing and making saleable minerals which form in part what is called the natural support of the soil. This is a contract made by the owner of both for his own profit, and in order that the coal may no longer lie valueless merely supporting the soil above it, but may be sold by him at a price, usually in the form of an acreage rent, which may enormously increase the value of his property.

It appears to us that outside of this contract there is no reservation of any right to support, whatever the exact nature of that right may be, but that we must look at the contract itself, and by a proper construction of it, having regard of course, as in all cases, to the subject matter, arrive at the extent to which the owner authorizes the minerals to be removed.

In addition to the reservation of a certain acreage rent for the coal got (in the present lease 85 $\frac{1}{2}$ an acre), it is an ordinary clause in such leases to have a minimum rent reserved to the lessor; that is to say, the lessee absolutely binds himself to get at least, or if not got to pay for, one or two acres or some other quantity of the coal, as the case may be (in the present lease 2*u.* 1*r.* 16*p.*). It is obvious that for such advantages as these the lessor may, at the same time that he grants the lessee the seam of coal, expressly authorize him to take the whole of it, or to take certain parts only, or he may expressly place the lessee under certain restrictions as to the mode of working.

It strikes us very strongly that in all these cases the contract would regulate the obligations and the rights of the parties. The lessor has made the mines, and the working and removing them from under the surface, and his rights connected therewith, the subject of contract. He has dealt with his rights, whatever their nature may be, as he was at liberty to do, and 389] he cannot afterwards *revert to them as the foundation of a claim as if they were of a nature not capable of being dealt with by contract, as if they must continue to exist *jure naturæ*, or under some other title.

No one would dispute that, if the lessor placed the lessee

under a covenant to remove the whole of the coal in a specified manner, and to pay a royalty of so much a ton for the whole, there would in that case be no responsibility if, in consequence of this being done, the surface subsided, or that such a case need be complicated by any question whether the lessor had intended to give up his right to support. The only question would be, whether the lessee had done what the lessor authorized and placed him under covenant to do. This and other cases which may be put seem to show that in all such transactions *inter partes*, the contract between them must determine what acts are lawful (as between those parties) so far as its proper construction extends to those acts.

Where there is a lease and licence to take the coal at an agreed acreage rent, with a minimum rent reserved, if the terms of the lease are that the lessee should work in specified manner, leaving certain described supports, then if the lessee works in that manner he would only have done what he was authorized to do, and would not be responsible if the surface subsided in consequence; and the same would be the conclusion if the covenant was that he should work according to the usual mode of working coal mines in the district; or if, having placed the lessee under certain restrictions as to the working, and so made the mode of working the subject of contract, the lease made no provision as to the mode of working in general. In the latter case we think the lessee must conform to the usual and approved manner of working in the district (which would probably be the result of experience), and that if he did so he would not be responsible for the consequences.

The lessee would then know what he was about, and how to proceed. He has to conform to the matters prescribed in the lease, and to the usage, and can go on during the whole period of his lease to get the coal from the whole area leased; but if he has no guide but the necessity to avoid subsidence, he must throughout be proceeding on an experiment to ascertain how much can be got with security; and in case some partial subsidence should take place, we do not see whether he is to [390] stop, or to go on, as a matter of right, from time to time perhaps causing further subsidence. We regard a mining lease not merely as a transfer of property, but as a contract under which something is to be done; and the question is, what it authorizes to be done.

If the authorities were clear, that under a mining lease the right of the owner to have the soil supported by the minerals was implicitly reserved in the absence of something which shows clearly that he gives it up, we should not offer our opinion in opposition to them.

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Eadon v. Jeffcock.

But although there are many authorities which have settled the right to support when the soil and minerals were held under different titles, or where there has been a conveyance of the land reserving the minerals, or where the surface and minerals are severed by an award under an Inclosure Act (*Harris v. Ryding* ⁽¹⁾; *Humphries v. Brogden* ⁽²⁾; *Smart v. Morton* ⁽³⁾; *Rowbotham v. Wilson* ⁽⁴⁾), the cases are few where the question has arisen on a mining lease.

In the case last referred to there had been an award under an Inclosure Act which the parties interested had all executed, and Lord Wensleydale considered that the award, being so executed, might operate as a grant of a right to work the minerals.

He used ⁽⁵⁾ the following language, which seems applicable to such leases as the present: "The rights of the grantee to the minerals, by whomsoever granted, must depend upon the terms of the deed by which they are conveyed, or reserved when the surface is conveyed." And after pointing out that some right to get the minerals is incident to the grant or reservation where there is no express limitation to get them, he adds: "But it rarely happens that these mutual rights are not precisely ascertained and settled by the deed by which the right to the mines is acquired, and then the only question would be as to the construction of that deed, which may vary in each case."

The case of *Dugdale v. Robertson* ⁽⁶⁾ was much relied on by 391] the *plaintiffs. In that case, in which the minerals had been leased at certain rents and royalties, with a provision that they should not be taken from underneath certain specified places, the Vice-Chancellor (Wood) was of opinion that in a lease of that description there was a presumption that the right to support was reserved, unless it appeared distinctly, by express words upon the instrument, that it was intended to be given up. Upon that case it may be observed, as distinguishing it from the present, that the demise there was of all the minerals of every description under the land, and not of one seam of coal called the High Hazle Bed, as in the present case; and further, that it does not appear what the reservation of rent was, whether of an acreage rent or in any other form. We may assume, however, that there was not a minimum rent as for two acres got, or so important a feature would not be omitted from the report of the case, and of the judgment. The Vice-Chancellor in the judgment refers to the case of the under story of a house being conveyed as analogous, which, as we have before stated, seems to us a different case.

⁽¹⁾ 5 M. & W., 60.

⁽²⁾ 12 Q. B., 739.

⁽³⁾ 5 E. & B., 30; 20 L. J., (Q.B.), 10;

24 L. J. (Q.B.), 200.

⁽⁴⁾ 8 H. L. C., 348; 30 L. J. (Q.B.), 49.

⁽⁵⁾ 8 H. L. C., at p. 360.

⁽⁶⁾ 3 K. & J., 695.

But this decision appears to us to be qualified by the subsequent cases of *Shafto v. Johnson*, decided by the same learned judge (of which there is a full report in 8 Best & Smith, p. 262), and *Taylor v. Shafto*.⁽¹⁾ Both these cases involved the same question, namely, whether lessees of coal mines under a certain lease, who had so worked the mines as to let down the surface, had committed an actionable wrong, in which case the mining lease would not have been an incumbrance to the title to the surface afterwards conveyed, or had only done acts which the lease authorized them to do, in which case the lease would have been an incumbrance.

In *Shafto v. Johnson* ⁽²⁾ Vice-Chancellor Wood came to a different conclusion from that which he had arrived at in *Dugdale v. Robertson* ⁽³⁾, and though there were no words distinctly reserving the right to support, he held in effect that the lessees were not responsible for the subsidence caused by getting the minerals. He commences his judgment ⁽²⁾ as follows:—"I have carefully considered the lease, and I cannot arrive at the conclusion that any *act has been done by the lessees [392 which is unlawful and contrary to the stipulations contained in it."

This embodies the view which we take of such a case as the present. In the subsequent part of the same judgment, in which the subject is gone into very fully, and the whole of which is well worthy of consideration, the learned judge refers to the case of *Dugdale v. Robertson* ⁽¹⁾ as one which went to the full extent of the authorities, and in which the case was put as strongly as it well could be against the view which he was entertaining in the case under consideration. No doubt the case of *Dugdale v. Robertson* ⁽³⁾ is not disapproved of; but it does appear to us that the principle of the two decisions is not the same, and that the correct view is taken at the beginning of the judgment in *Shafto v. Johnson* ⁽²⁾ which we have given above.

The judgment in the Exchequer Chamber in *Taylor v. Shafto* ⁽¹⁾, agrees with that of the Vice-Chancellor in making the terms of the lease decisive as to the extent to which the lessees were justified in going in working the mines.

The case is not referred to as decisive of the present case, because the terms of the lease were different, and there were other covenants; but as showing the proper principle of decision.

We must now refer to the terms of the lease in the present case, which seem to us to be sufficiently clear and precise. It first contains a demise of all the seam of coal called the High Hazle Bed, lying under certain closes, containing 108a. 3r. 1p. It then contains certain powers over the surface, for the exercise

⁽¹⁾ 3 B. & S., 228.

⁽²⁾ 8 B. & S., at p. 252, n.

⁽³⁾ 3 K. & J., 605.

of which compensation is to be paid. It then gives power and authority to dig pits, &c., and "to win, get, work, raise up, stack, carry away, sell, and dispose of all that the said mine or bed of coal." It then gives authority to take clay, brick earth, &c., from the surface, and to make bricks for necessary buildings. It will be seen presently that the authority to take all the mine, is afterwards qualified by certain express exceptions. We have then the clauses for payment of rent, according to which there is a minimum rent of 200*l.* a year, as for 2*l.* 1*s.* 16*p.* got, and in addition 85*l.* for every additional statute acre, in-393] cluding all ribs and pillars left in working *the coal, with the exception of certain specified pillars. The meaning of this appears clearly to be, that as the coal cannot be worked without leaving certain ribs and pillars as the work is proceeding, those ribs and pillars, though not removed, are to be included in the half-yearly measurement from time to time of the acreage to be paid for. The pillars referred to are pillars left in working the mine, which have not reference to the support of the surface, but to prevent the mine from being blocked up by what would fall from the top of the mine and interfere with the working.

Then follows afterwards an important clause of exceptions out of the mine which the lessees are to be allowed to take, and which exceptions are not to be measured in and paid for, viz., that the following pillars shall be left during the whole of the term; and they are then specified. This appears to us conclusive to show that the other pillars, which are necessary for working the mine and measured in as the work proceeds, need not be left during the whole of the term, but may be removed when not wanted for working the mine in the usual manner.

Then follows afterwards another important clause regulating the manner of working the mine, by which the lessees covenant (inter alia) during the continuance of the demise to work and manage the mine to the best of their skill and discretion, and in a good and workmanlike manner.

It appears to us that, upon the reasonable and proper construction of this lease, it authorizes the removal of all the coal, with the exception of that which is covenanted to be left during the whole term, and subject to the mine being worked and managed during the whole term in a good and workmanlike manner.

If there existed any usual and approved mode of working mines in the district, we should further think the lessees were bound by it, though not expressly mentioned.

We have only then to consider the facts of the present case to see whether the defendants have made themselves responsible for what they have done, and upon this we think that the

statements of the case are sufficient to absolve the defendants from liability.

It appears from the case that, in consequence of the defendants' workings, the land and buildings of the plaintiffs subsided: that the land would have subsided without the buildings, that all the pillars *provided for by the lease had been left, [394 and that there was nothing in the course adopted by the defendants in their coal workings contrary to the usual course of mining in the district. It would have been better if, instead of this negative statement, there had been a positive statement that the mine was worked in a good and workmanlike manner, and according to the usage of the district; but we think the actual statement necessarily amounts to this.

The statement, that enough pillars might have been left to support the surface is of an obvious truism, and ought to have no effect.

We think, therefore, that the defendants have only done what they were authorized to do by this lease, and that for the reasons above given they are entitled to our judgment.

This makes it unnecessary to consider the other questions argued before us, viz., to what extent the plaintiffs are entitled to recover.

BRAMWELL, B. In this case the defendants have a lease of a seam of coal. It may not appear of much consequence by what name their interest is called, but the word "lease" may in such cases have helped to a particular conclusion. For by that word we commonly understand a temporary estate granted in something which, at the end of the term, is to be restored to the lessor in the condition in which it was delivered to the lessee, fair wear and tear excepted, as in a lease of land, house, or moveable chattel. But that is not the intention of a lease of a seam of coal. That is more a sale of the coal, or grant of a right to take and remove it within a certain time, and it is not to be restored at the end of that time to the grantor. Treat it as a sale of the coal, provided the vendee get it all within a certain time, and why should the grantor be at liberty to say "Though in terms I sold the whole of it, yet by implication I reserved as much as was necessary to support the surface in its natural condition." Why should not the argument be good, "If you meant that exception you should have said so in words." Suppose a sale of brick earth or gravel, by metes and bounds, and suppose the vendee took it all, and suppose then the soil of the vendor outside the boundary crumbled in for want of lateral support, would the vendee be liable to a claim in respect thereof by his vendor, and if he would, why? With great respect such a *deal- [395 ing with a seam of coal is more like selling the materials of

an intermediate floor than letting or selling the floor. Suppose a man with a three-storied house sold the materials of the second floor, would he have a right to say, "But you must leave enough to support my third story, or you must prop it up?" It is true a lessee of a mine may take all the coal, and artificially prop the surface; but, practically, this is impossible owing to the expense; and the same argument applies, viz., why did not the grantor stipulate for it? It may be said that if this argument is true of a lease or grant of coals, to be taken in a certain time, it would be equally so of a grant to be taken whenever the grantee thought fit; if so, of all cases where the ownership of mines and surface was served; and that the authorities are overwhelming the other way. But, in the first place, the argument is not so strongly applicable where the grant allows that grantees to take at any time, because a grantor may well allow his lands to be let down, provided it is to be done within a certain time, where he would object if he could not tell for all futurity when it might happen. In the next place, where the terms of the severance, are not known, but only that there is a severance, then it may as well be presumed one way as the other. That is a case ownership, not contract as this is. Here the terms of the contract that gives the right to take the coal are known, and the question is why does not the general principle apply, viz., look at what is said the deed, and add nothing, except from a necessity for doing so. Then those terms give the defendants the whole of the coal, for there is no difference between the words "the coal" and "all the coal," and indeed the words here are "all that seam." Then what necessity is there for implying a matter contradictory thereto, viz., that the right is not to the whole of the coal, but only a part, leaving enough to support the surface?

But supposing these would be right principles on which to decide this case, and I am not sure they would, I have great difficulty in applying them to this case, and in adopting the forcible arguments of my Brothers Martin and Cleasby. For the cases have established that where there is a severance of mines from the rest of the soil, however it may have been created, what the learned counsel for the plaintiffs called the natural right is, that 396] those *entitled to the mines, and those entitled to the residue of the soil, must each so use his part as not to injure the other; probably on the basis of the maxim, *sic utere tuo ut alienum non lædas*. This rule was alleged by the plaintiffs, and indeed admitted by the defendants' counsel to apply to cases where the mines were leased. And it was agreed that the question must depend on the terms of the lease, and whether from them this natural or ordinary right had been given up by the

lessor. For these positions *Harris v. Ryding* ⁽¹⁾ *Humphries v. Brogden* ⁽²⁾, *Smart v. Morton* ⁽³⁾, *Rowbotham v. Wilson* ⁽⁴⁾, *Dugdale v. Robertson* ⁽⁵⁾, *Taylor v. Shafto* ⁽⁶⁾, and other cases were cited. It seems to me that *Dugdale v. Robertson* ⁽⁵⁾ is not easily distinguishable from this case.

Assuming this rule to apply to leases, we must examine the deed to see if there is anything to take away this so-called natural right. Now the lessees are to pay by an acreage rate no doubt, and so if they have to leave pillars they will pay for what they do not take. It may be they have allowed for this in calculating the rent. It is expressly provided that the measurement is to include "all ribs and pillars left in working the said coal," except certain named pillars. They will therefore have to pay for something including in the acreage which they must or may have to leave for any reason, and why not then for pillars to support the surface? Further, it was said that the obligation which is laid on the lessees to leave certain named pillars precluded the necessity of leaving others, on the principle of *expressio unius est exclusio alterius*. But this is not so. That maxim only applies where the expressed matter would be superfluous if the implied were expressed or assumed. That is not the case here. The named pillars are to be left for wholly different purposes than the general support of the surface. This was decided in *Dugdale v. Robertson* ⁽⁵⁾ *see per Wood, V. C., in Shafto v. Johnson.* ⁽⁷⁾ In the result I find nothing to limit that natural or ordinary right, if it exists in cases of leases of mines, and so far I should have great difficulty in deciding against the plaintiffs. *Taylor v. Shafto* ⁽⁶⁾ and *Shafto v. Johnson* ⁽⁷⁾ are in no way contrary to *Dugdale v. Robertson* ⁽⁵⁾. In those cases it was held, both at law and in equity, that the lessor of the mines had made the lessee covenant to do what was inconsistent with the leaving supports for the surface. The Vice-Chancellor says ⁽⁹⁾, "I can come to only one conclusion, viz., that there was an intention that all the coal that could be got, regard being had to the safety of the mine, should be got."

The second question is this: the defendants' lessor Sotheron, conveyed the whole of the premises, including the reversion in the mines, to Roberts; Roberts reserving to himself the rent and reversion of the mines, fire-clay, other clay, stone and minerals, granted and conveyed the residue of the soil to the plaintiffs. And it was contended by the defendants, that by this conveyance the grantees took without a right to support for houses built over the mines, and without a right to recover damages for injury to houses arising from the surface being let

⁽¹⁾ 5 M. & W., 60.

⁽²⁾ 3 K. & J., 695. ⁽³⁾ 8 B. & S., 228.

⁽⁴⁾ 12 Q. B., 739; 20 L. J. (Q. B.), 10.

⁽⁵⁾ 8 B. & S., at p. 257, n.

⁽⁶⁾ 5 E. & B., 30; 24 L. J. (Q. B.), 260.

⁽⁷⁾ 8 B. & S., at p. 252, n.

⁽⁸⁾ 8 H. L. C., 348; 30 L. J. (Q. B.), 49.

⁽⁹⁾ 8 B. & S., at p. 255, n.

down by mining operations. This undoubtedly is so, if those mining operations were carried on by Roberts, or by his lessees, under leases granted subsequently to the conveyance to the plaintiffs. But it was said by the plaintiffs not to apply to the defendants, who were lessees at the time of the conveyance to the plaintiffs. I think it does. The lease of June, 1840, under which the defendants have the right to work, is mentioned in the conveyance to the plaintiffs, and the words are general and unqualified: "Roberts, his heirs or assigns, tenants or lessees, shall not be responsible for damages caused to dwellings which shall hereafter be erected," by mining operations. And it is clear that as the mines and the reversion to the mines were separated from the rest of the soil, Roberts covenants with the plaintiffs for the performance of the same matters for the benefit of the surface owners that the lessees had covenanted with Sotheron to perform for their benefit. And it is also clear that a power of distress which is given to the plaintiffs, would enable them to distrain on the defendants' goods. It is asked, why are the defendants to have the benefit of an arrangement to which they are not party or privy? The answer is, that the 398] very foundation of the plaintiffs' case is a *right to support as against the defendants, and if the plaintiffs have taken their estate without that right the defendants incidentally get a benefit perhaps not contemplated. It may be that Roberts thought the defendants entitled to work so as to cause subsidence of the surface. It may be, though we cannot see why, that he wished them to be so entitled. Be that as it may, it seems clear to me that the plaintiffs have taken their estate subject to a right in Roberts and his tenants, including the defendants, to damage the surface houses without a liability to compensate the plaintiffs and their tenants. It is as though a man owned farms A and B, and granted B, reserving a right of way over it to himself as owner, and his tenants, of A. This would operate as a grant by the grantee of B, and would enure for the benefit of an existing lessee of A. It would be strange if the defendants could surrender their lease, and then on the grant of a new one have the right, and yet not have it now. But there is nothing in the conveyance to the plaintiffs to take away their natural or ordinary right of support to the land, if it exists, and therefore if there is any damage to land by subsidence, and the defendants are not right on the first question the plaintiffs are entitled in respect of it. This is probably of small consequence, and having regard to the opinion of Martin and Cleasby, BB., I answer both questions in favor of the defendants.

Judgment for the plaintiffs.

Attorneys for plaintiffs: *Pullison, Wigg, & Co.*

Attorneys for defendants: *Singleton & Tattershall.*

IN THE COURT OF PROBATE AND DIVORCE.

April 20, 1872.

*COTTRELL v. COTTRELL.

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[L.R., 2 Probate and Divorce, 397.]

Two Wills — Revocation — Appointment of Executor revoked without express Words of Revocation — Costs.

A testator by his first will, executed in England according to English law, disposed of all his realty and personalty and appointed an executor. By his second and last will, executed in Italy, where he was domiciled at the time of his death, according to the law of Italy, he appointed his wife his universal heiress, and the will contained a revocatory clause in the following terms: "I erase, revoke, and annul every other act or last will which I may have made."

The Court held that the Italian will revoked the disposition of the personalty and the appointment of executor contained in the English will, and that the Italian will alone was entitled to probate. The executor of the English will, who propounded it as entitled to probate with the Italian will, was condemned in costs.

THE testator, Henry Count Cottrell, was an Englishman by birth, but he had lived for many years in Italy and had acquired an Italian domicile, and he died at Nervi, in Italy, on the 15th of March, 1871. He left two wills: the first executed in England, according to the form prescribed by the law of England, on the 8th of April, 1850; the second, executed in Italy, according to the form prescribed by the Italian law, on the 20th of December, 1865. The English will disposed of all his property, real and personal, and appointed his brother, the defendant, executor; the Italian will appointed his wife, the plaintiff, his universal heiress, and contained a general revocatory clause. On the 7th of April, 1871, the defendant proved the English will in common form, and the plaintiff afterwards called in that probate and instituted this suit for the purpose of having it revoked. The question raised by the pleadings was whether the Italian will revoked the appointment of the defendant as executor contained in the English will. The cause came on for hearing before the Court without a jury.

The clauses of the Italian will on which the question turned were as follows: "I erase, revoke, and annul every other act or last will which I may have made, willing that this my present will shall receive all its efficacy and execution." After making certain bequests, the will continued: "In respect of all my other goods, real or personal rights and shares, and of all and whatsoever I may find myself having, enjoying, and possessing at the day of my *demise, in whatever locality placed and situ- [398
ate, as my universal heiress I nominate and will to be the

Countess Sophia Augusta Cottrell, my well beloved consort; and in event of this my consort dying before coming into my estate, then I nominate as my universal heirs, my sons and daughters as my heirs in equal portion one with the other, without distinction of sex; and in the event of no legitimate children of mine and of my above named consort being in existence at the time of my decease, then I institute and nominate as my heirs my beloved brother George Edward Cottrell and my beloved sister-in-law Caroline Augusta Ley, the wife of James Peard Ley, and widow of John Gordon, sister of my well beloved consort, and in their default their heirs in equal portion between the two."

Two advocates had been examined at Florence under a commission, who proved that by the law of Italy the Italian will was valid, that it appointed the plaintiff universal heiress, and that the revocatory clause contained in it operated as a revocation of all previous wills, including the appointment of executors.

Dr. Spinks, Q.C., and Bayford, for the plaintiff, argued that the Italian will revoked the appointment of executor contained in the first will, by the English law as well as by the Italian law and cited, *Henfrey v. Henfrey* ⁽¹⁾, *Laneville v. Anderson* ⁽²⁾.

Dr. Deane, Q.C., and Pritchard, for the defendant. Both wills are entitled to probate, because the second will does not revoke the appointment of executor contained in the first will. *In the Goods of Jordan* ⁽³⁾; *In the Goods of Leese* ⁽⁴⁾; *Geaves v. Price* ⁽⁵⁾. The term universal heir is not co-extensive with executor: *Anderson v. Poilblank* ⁽⁶⁾. The devise of realty in the English will is not revoked by the Italian will.

LORD PENZANCE. The right to prove the first will is based on the law of England, and the argument is that if there be a will which disposes of personalty and realty, and nominates an executor and there be a subsequent will disposing only of personalty, and not affecting the realty, the first will is entitled to probate 399] as well *as the second, because there is no revocation in the second of the devise of realty, and of the nomination of executors. A case was cited in support of the proposition that the language used by the testator in the second will did not revoke the appointment of executors. I propose to deal first with the question whether, assuming that the English law is to be applied to the case, the facts are such as to bring it within the proposition that the first will is not revoked by the second.

The second will disposes of all the personalty of the testator. After making certain bequests, it proceeds thus: "In respect of all my other goods, real or personal, rights, and shares, and

⁽¹⁾ 4 Moo. P. C., 29.

⁽²⁾ 2 Sw. & Tr., 24.

⁽³⁾ Law Rep., 1 P. & M., 555.

⁽⁴⁾ 2 Sw. & Tr., 443.

⁽⁵⁾ 3 Sw. & Tr., 71.

⁽⁶⁾ 3 Atk., 299.

of all and whatsoever I may find myself having, enjoying, and possessing at the day of my demise, in whatever locality or place situate, as my universal heiress I nominate and will to be the Countess Sophia Augusta Cottrell, my well beloved consort."

This clause is in the disposing part of the will, and it is obvious enough that the testator's intention was to make his wife residuary legatee, or in the language used in foreign countries, his universal heiress. There is no technical rule as to the words necessary to operate as a revocation; the question is simply one of intention. Bearing in mind that it was clearly the testator's intention to make his wife his universal heiress, I pass to the words of revocation. "I erase, revoke, and annul every other acts or last will which I may have made, willing that this my present will shall receive all its efficacy and execution." It seems to me that, giving a legitimate meaning to these words, they entirely revoke the preceding will. It is a question of intention, and how can it be supposed that the testator, having made his wife his universal heiress, and having "erased, revoked and annulled" every other act or last will which he may have made, intended to keep alive the nomination of executor contained in a former will, the provisions of that former will being revoked, except as to the realty, with which an executor has nothing to do. Treating it as a question of intention, to be gathered from the construction of the last will, I am of opinion that it revoked the appointment of executor in the preceding will.

There is another view of the case based upon the Italian law. The evidence before the Court proves that, according to the law of Italy, the revocatory clause in the last will would carry [400 with it the revocation of the previous appointment of executors. The advocate Siccoli deposes that a general revocatory clause in a posterior will annuls an anterior will. "The revocatory clause in the will of the 20th of December, 1865, is sufficient to revoke the will of April, 1850, and this revocation would extend to the appointment of executors in the previous will."

The appointment of executor in the English will having been revoked by the Italian will, both according to English law and according to Italian law the Court revokes the probate of the English will which has been granted to the executor.

Dr. Spinks. The defendant should be condemned in costs, for he ought not to have taken probate when he knew that there was a later will.

Dr. Deane. It is a case of first impression, and the executor had a right to take the opinion of the Court upon it.

LORD PENZANCE. I do not think the defendant was to blame

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Giles v. Warren.

for taking probate in the first instance, but I cannot help asking myself what need was there for all this litigation? A commission has been sent to Italy, skilled witnesses have been examined, and a great deal of expense has been incurred, the only question being whether the executor appointed by the first will could insist upon his right to act as executor, after the will itself had been substantially revoked, and all the duties of an executor had been withdrawn from him by the different disposition of the property. In substance, the will is merely a will of realty, and does not require to be proved in this court. He could have no object in proving the will, even if, on technical grounds, he had been entitled to do so, for he had no interest as executor to guard or maintain, and the litigation which he has provoked seems to me wholly unnecessary. As he had no *bonâ fide* motive that I can discover, and he has failed on the question of law which he has raised, he must be condemned in costs.

Solicitor for plaintiff: *William Ley*.

Solicitors for defendant: *G. H. & S. Brandon*.

(^c) The domicil of the testator at the time of his death is to govern his will. *Law Reg. N.S.*, 148, 162, *note*; *Matter of McCormick*, 2 *Brad.*, 169; 1 *Redfield* *Moultine v. Hunt*, 22 *N. Y.* 394; 1 *Am.* on Wills, 410.

May 23, 1872.

401]

*GILES AND CLARK V. WARREN and others.

[*Law Reports*, 2 *Probate and Divorce*, 401.]

Will — Revocation by tearing — Intention.

A testator, under the false impression that his will was invalid, tore it up. Immediately afterwards, on reconsideration, he collected the pieces, and placed them together amongst his papers of importance, and preserved them until his death: *Held*, that as the act done was not accompanied by an intention to revoke a valid will, it was ineffectual, and the will was admitted to probate.

DANIEL GILES, of West Street, London Fields, Hackney, Middlesex, died on the 16th of July, 1871, having made a will bearing date the 24th of November, 1866, in which he appointed his wife Susan Giles, George Clark, and William Grimwood King, executors and trustees. By this will he ordered certain freehold houses and land belonging to him to be sold, and out of the proceeds of the sale several legacies to be paid, and the residue of his real and personal estate he left to his wife absolutely. The plaintiffs, as two of the executors named therein, propounded this will, and the defendant, Rebecca Warren, one of the next of kin of the deceased, pleaded that it was not executed according to the provisions of the statute 1 *Vict. c. 26*: and that after the making of the alleged will the said Daniel Giles revoked the same by tearing it, with an intention to revoke the said will. Issue was joined on these pleas, and on the 3d

of April, 1872, it was ordered that the cause should be tried on oral evidence before the Court itself. At the hearing the due execution of the will was proved, and Mrs. Giles, the plaintiff and the widow of the deceased, deposed that after the execution of the will her husband placed it in a box where he kept his deeds and papers. In the summer of 1868 she accompanied her husband to Yarmouth, where they made the acquaintance of a Mr. Hillstead. After their return home Mr. Hillstead called upon them in West Street. In the course of conversation, reference having been made to his will, her husband said to Mr. Hillstead, "I will get it out and show it to you." He did so. Mr. Hillstead read it, and said it was not legal. Mr. Giles asked, "Why not?" Mr. Hillstead said, "Because the items are not named in it, the particulars of the money in the bank." Mr. Giles took the will, and said to the deponent, "Well then, child, it is of no use." He had the paper in his hand. He [402 tore it at the moment he spoke to her. He then gave to deponent the bits and said, "Lay them on the fire." There was no fire lighted. She laid them on the grate and then went into the garden. Shortly afterwards Mr. Giles followed her into the garden and called out, "I have bethought myself, George don't know everything. I have taken them away." He had the pieces of the will in his hand. He further said, "I will put them away; they will be of use to you at some future time." Mr. Giles then put the pieces in a book, and placed it in a box with his other papers.

Mr. Hillstead was also examined, and deposed as to his visit to Hackney, in August, 1867, and to the reading of the will. He told the testator that he had better have inserted the particulars of his property in the will, but he did not say that without such particulars the will was invalid. It was very likely the testator thought from what deponent said that the will was not legal. Declarations of the testator of his intentions in tearing the will, made subsequently to the date of this transaction, were offered, but rejected by the Court.

Dr. Deane, Q.C., and *Indérwick*, appeared for the plaintiffs, and contended that as the act was done under a misapprehension it was not a final act, and there was no revocation. They referred to *In the Goods of F. B. Colberg* (1); *Elms v. Elms* (2); *Clarkson v. Clarkson and others*. (3).

Dr. Spinks, Q.C., and *Bayford*, appeared for the defendants, but did not offer any opposition.

LORD PENZANCE. I think in this case there was no revocation. The fact that a testator tears or destroys his will is not

(1) 2 Curt., 832.

(2) 1 Sw. & Tr., 155.

(3) 2 Sw. & Tr., 497.

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In the Goods of Turner.

itself sufficient to revoke one properly executed. That is to say, the bare fact. If, for instance, he tears it imagining it to be some other document, there would be no revocation, for there would be no *animus revocandi*. He must intend by the act to revoke something that he had previously done. There can be no intention to revoke a will, if a person destroys the paper under the idea, whether right or wrong, that it is not a valid 403] will. Revocation is *a term applicable to the case of a person cancelling or destroying a document which he had before legally made. He does not revoke it if he does not treat it as being valid at the time when he sets about to destroy it. According to the evidence the testator, in consequence of some conversation he had with Hillstead, was under the impression that he had made no valid will, and, as being useless, he tore the document up and threw it on the fire. That is no revocation. What happened afterwards was not material. If the will had been once revoked, the testator could not set it up again by subsequent declaration.

Attorney for plaintiffs: *A. Crossfield*.

Attorney for defendants: *J. Terry*.

May 28.

***IN THE GOODS OF E. H. TURNER.**

[Law Reports, 2 Probate and Divorce, 403.]

Will and Codicil — Will destroyed — Codicil not revoked — 1 Vict. c. 26, s. 20.

The deceased executed a will and codicil. In the latter she referred in several paragraphs to the dispositions contained in her will, and more particularly she bequeathed a certain legacy to be held under conditions stated in her will. She subsequently destroyed the will by burning it, but preserved the codicil:

Held, that as the codicil was not revoked by any of the methods prescribed by the Wills Act, it must be admitted to probate.

ELIZA HUDDART TURNER, of Tandridge, Surrey, spinster, died on the 19th of April, 1872. On the 8th of June, 1858, she duly executed a will, in which she appointed William Cotton and Charles Hampden Turner to be her executors; and on the 27th of July, 1864, a codicil to the following effect: "This is a codicil to the will of me, Eliza Huddart Turner, formerly of, &c, which will bears date the 8th day of June, 1858. In consequence of the heavy affliction with which God has seen fit to visit my dear nephew, Charles Hampden Turner, I hereby revoke and cancel all the parts of my said will which relate to him; and I hereby give and bequeath to my nephew, Francis Matthew Hampden Turner, the six thousand pounds which I had bequeathed to his brother, C. H. Turner, to be held by the said 404] Francis Matthew Hampden *Turner under the conditions

stated in my said will, and in addition to the six thousand pounds bequeathed to him absolutely in the said will. And I hereby give and bequeath the residue of my real and personal property whatsoever and wheresoever to my nieces, &c., to be divided between them in such manner as they shall decide. I hereby recall the appointment of my friend, William Cotton, Esq., of Walwood House, as my executor, and appoint his son, Henry Cotton, Esq., my sole executor. And in all other respects I confirm my said will." On the death of the deceased this codicil was found in an envelope endorsed "Dated 8th June, 1858. Will of Miss Turner. Executors, Henry Cotton, Esq., (in the handwriting of deceased), "Chas. H. Turner, Wm. Cotton" (these two last names were struck out with a pen). In a corner were the words "Codicil dated July 27th, 1864." No will was found in the envelope, which had been originally sealed and afterwards re-opened. The will had been burnt by the deceased, with an intention to revoke it, and certain memoranda were left by her in accordance with which she desired her property to be distributed.

Dr. Deane, Q. C., on the part of Mr. Cotton, the executor named in the codicil, and also on behalf of the next of kin, applied to the Court to direct what papers, if any, should be admitted to probate. He submitted that the codicil was so worded that it could have no operation independently of the will. He referred to *Barrow v. Barrow and Others* ⁽¹⁾; *Hale v. Tokelove* ⁽²⁾; *Rodgers v. Goodenough and Others* ⁽³⁾; *In the Goods of W. Greig* ⁽⁴⁾; *Black v. Jobling* ⁽⁵⁾.

LORD PENZANCE. This question has arisen several times lately. It is, whether, when a will has been revoked, a paper which is called a codicil perishes with it? Before the statute there is no doubt that if the will were destroyed, *primâ facie* the codicil fell with it; and in some cases that have been decided since the statute a similar principle has been upheld, provided that if the Court thought that the testator intended that the codicil should *have an operation independent of the will, it would admit it to probate, although the will had been destroyed. I have tried in vain to get a clear idea of what was meant by a codicil being dependent or independent of the will; and in *Black v. Jobling* ⁽⁵⁾ I endeavored to show the difficulty I had had to find any safe rule on which I could act. "In one sense any codicil that makes any disposition of property at all must be considered to be dependent on the will, which disposes of the rest; for the codicil conveys only a part of the testator's intention regarding

(1) 2 Phillim. t. Lee, 335.

(2) 2 Sw. & Tr., 342.

(3) 2 Robert, 318.

(4) Law Rep., 1 P. & M., 72.

(5) Law Rep., 1 P. & M., 885.

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In the Goods of Turner.

his property, and the motives inducing that particular part of his intention cannot, with any certainty, be dissevered from the motives which induced the disposition of the rest. It is difficult, if not impossible, to predicate of a particular bequest in a codicil, that the testator would have made it if he had disposed of his other property in any different manner than that expressed by his will. It may be that the "independence of the will" spoken of is something of a more limited character; and the meaning of the cases may be that a codicil is independent of a will, unless it be of such a character that the giving validity and effect to it without the will to which it was intended to be attached would produce some manifest absurdity. I am not sure that even this rule is capable of being easily applied to all the cases that might arise, and I have serious doubts whether such a rule is to be gathered from the cases with sufficient distinctness to justify the Court in adopting it." I went on to state that it seemed to me that the statute had settled the matter, and that it is no longer competent for this Court to hold that a properly executed testamentary paper can be revoked in any other manner than by the methods stated therein. The words of the statute are decisive; and if on some speculation as to the testator's intention or supposed intention in reference to a connection between the will and codicil, I were to hold that the codicil is revoked by some method not in accordance with the statute, I should be acting directly contrary to its provisions. It is true there have been decisions since the statute to a contrary effect, but there is some confusion in the opinions of the learned judges, as reported. Sir H. J. Fust is supposed to have stated in one case that the only difference made by the statute was that it 406] *required that an "intention to destroy must be shown;" whilst Sir C. Cresswell stated that Sir H. Fust had decided that the statute made no difference at all. I must hold that the words of the statute are imperative. But it is said there is a difficulty in this case, because, by reason of the will having been destroyed, the codicil in great part is unintelligible. It seems to me that that difficulty has no bearing upon the question whether this codicil shall be admitted to probate. The same difficulty applies in every case where some other document is mentioned in a will, in such manner that the directions of the will cannot be carried out without a reference to such document, and that document is not forthcoming. It is a question of construction, which another Court only can decide. I am clear the codicil must be admitted to probate. The will having been destroyed, it is the only testamentary paper so admissible.

Proctor : *Toller.*

June 11, 1872.

IN THE GOODS OF DURANCE.

[Law Reports, 2 Probate and Divorce, 406.]

Will — Codicil — Directions to destroy Will — Revocation.

The testator, in a letter addressed to his brother, which was signed by him in the presence of two witnesses, directed his brother to obtain his will and burn it without reading it:

Held, that the letter was a writing duly executed declaring an intention to revoke the will, and administration with the letter only annexed was granted to the next of kin of the deceased.

THOMAS JOHN DURANCE, Orchard Lane, Lincolnshire, gentleman, died on the 13th of September, 1871, at the General Hospital, Toronto, Canada, leaving his brother Joseph Durance, one of his next of kin. On the 14th of March, 1871, he executed a will, in which he named Thomas Joseph Plant sole executor. By this will he gave legacies of 100*l.* each to his brother Joseph Durance, and to his sister Harriett Elizabeth Durance, and 250*l.* to Thomas Joseph Plant. He charged these legacies on his real estate, and subject to them he devised his real estate and the residue of his personal estate to Annie Swallow absolutely. After the date of the will he went to Canada with the intention of permanently *residing there. On the 13th [407 of September, 1871, he wrote two papers, which he sent to his brother Joseph Durance in England. The first was as follows.

"I, Thomas John Durance, authorize Mr. Denman, of the firm of Messrs. Mee, Denman, & Co., solicitors, of Retford, in the county of Nottingham, to deliver up in full to my brother Mr. Joseph Durance, of No. 9, the Park, in the city of Lincoln, England, the will completed by me at his residence on Tuesday evening, the 14th of March last, together with the copy of the will of my late grandfather, Mr. Joseph Durance, Senior.

"Thos. John Durance.

"Witnesses to the signature of Thomas John Durance,

"John Greenshields,

"John Herbert."

The second paper was:

"My dear Joe,—Enclosed, I hand you an order to get my will from Mr. Denman, which please burn as soon as you receive it without reading it. I will leave you my share as a deed of gift, leaving it to your honor to pay out of it 100*l.* each to each of my two sisters, and 100*l.* to Thomas Plant. I am very ill, so good bye. God bless you.

"Your affectionate brother,

"Thos. J. Durance.

Witnesses,

"John Greenshields,

"Frank Booth."

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Lee v. Lee.

This paper was executed in accordance with the requirements of the law of the province of Ontario, Canada, in which Toronto is situate.

Inderwick moved the court to grant probate of the will, and also the letter to the executor named in the will.

LORD PENZANCE. The question is, whether the will is not revoked by the letter. If a man writes to another "Go and get my will and burn it," he shows a strong intention to revoke his will. In the language of the 20th section of the Wills Act (1 Vict. c. 26), the letter is a writing declaring an intention to 408] *revoke the will, and it is duly executed. It is also of a testamentary character, and therefore I shall grant administration with it annexed to Joseph Durance the brother and one of the next of kin.

Attorneys: *Swann & Co.*

Feb. 28, 1872.

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*LEE v. LEE.

[Law Reports, 2 Probate and Divorce, 409.]

Evidence of Cruelty — Surprise — New Trial as to some Charges of Cruelty, not as to all — Practice.

A wife having charged her husband with cruelty by the communication of disease, and also by personal violence, the Court found, on the evidence, that the charge of communication of disease was not proved, and that the charge of personal violence was proved. On the application of the husband, a rule for the rehearing of the issue which had been found against him was made absolute, on the ground of surprise; but the rehearing was ordered to be confined to the charge of personal violence, and not to extend to the charge of infection.

THESE were cross petitions in which the same issues were raised. The husband's petition was for restitution of conjugal rights, and the wife by her answer alleged adultery and cruelty. The wife's petition was for dissolution of marriage on the grounds of adultery and cruelty, and the husband's answer traversed those allegations. The two suits were heard together before the Judge Ordinary without a jury on the 29th of November, 1871. The cruelty charged by the wife consisted of divers acts of personal violence, and also of the communication of venereal disease, and the charge of adultery rested on the same evidence as the charge of cruelty by infection. Several medical witnesses were examined upon that issue.

In the result the Court came to the conclusion that the charge of infection was not proved, and therefore found the issues of cruelty by infection, and of adultery, in favor of the husband. But the issue of cruelty by personal violence was found in favor of the wife.

A rule nisi for a new trial of the issue of cruelty found against 410] *the husband was afterwards granted on his application,

and that rule after argument was made absolute on the ground of surprise. The question was then raised whether the charge of cruelty by infection as well as the charge of personal violence was to be reheard. On the application of the wife the rehearing was ordered to be before a common jury.

Dr. Spinks, Q.C., and Inderwick, were for the wife.

D. Seymour, Q.C., and G. Browne, for the husband.

Feb. 28. THE JUDGE ORDINARY. In this case an application was made for a rehearing on the ground of surprise, and the Court having intimated that the application would be granted, a question arose whether the wife, who was the petitioner in one suit and the respondent in the cross suit was or was not entitled to have the charge of the communication of venereal disease, which she brought against her husband, included in the questions to be submitted to the jury on the rehearing. The husband contended that this question ought not to be included in the new inquiry, because it was satisfactorily disposed of by the Court on the last inquiry, and that he would be put to considerable expense in producing a great deal of medical and other testimony if the question were to be tried a second time. The same issues were raised in the cross suits, the wife alleging that the husband had treated her with personal violence on four or five occasions which she specified, and further alleging the communication of venereal disease, making a charge of adultery founded on the same allegation. In granting a rehearing, the Court was mainly influenced by the fact that some evidence was given by the wife in support of one of the charges of personal violence which the husband had no reason to expect. She vouched a particular person as having been present when the act was committed, and the husband having no cause to suppose that he would be vouched, he was not in attendance. That person has now made an affidavit stating that he was present on the occasion referred to, but that nothing of the kind stated by the wife occurred. The Court thought this was a fair ground of surprise on which a new trial should be granted, but it is obvious that this being the ground of the new trial it does [411 not extend to the re-opening of the question whether or not venereal disease was communicated to the wife. Under all the circumstances, I think it would be unfair to the husband to put him to the cost of a second inquiry into that question. The Court therefore proposes so to frame the issue for the jury as to confine it to the question whether the husband was guilty of cruelty by personal violence.

The husband must of course pay the costs of the first suit before the second trial.

Attorneys for wife: *Albridge & Co.*

Attorneys for husband: *Paterson & Co.*

ADMIRALTY

AND

ECCLESIASTICAL COURTS.

June 14, 1872.

534]

*THE GLENGABER.

[Law Reports, 8 Admiralty and Ecclesiastical, 534.]

Salvage—Right of Owners of Salvaging Vessel to Salvage Reward in a case where some of them were also Owners of the Vessel which occasioned the Mischief.

By the improper navigation of a steam tug *B.*, a vessel at anchor was sent adrift and placed in jeopardy. A steam tug, *W.*, rendered assistance to the drifting vessel:

Held, that the owners of the *W.* were entitled to recover salvage reward for the services rendered, notwithstanding that some of them were also owners of the vessel which occasioned the mischief.

THIS was a salvage suit instituted on behalf of the owners of the steam tugs *Black Prince*, *Sir George Grey*, and *Warrior*, against the ship *Glengaber*, her cargo and freight, and against her owners and the owners of her cargo intervening. The facts of the case were somewhat complicated, but so far as they are material they may be stated shortly as follows—The *Black Prince* was towing the bark *Strathmore* up the river Mersey at about a quarter before 10 P.M. on the 8th of April, 1872. The *Glengaber* was lying at anchor in the part of the Mersey known as the Sloyne; the *Strathmore* came into collision with the *Glengaber*; the *Strathmore* sank, and the *Glengaber* was set adrift and came into collision with the bark *Indus* at anchor in the Sloyne, and set her adrift. The *Indus* and the *Glengaber*, with their yards locked, drifted together. The *Black Prince* got a hawser from the *Glengaber* and checked the drifting vessels, without, however, being able to stop them. The *Sir George Grey* came up and assisted the *Black Prince* to hold the vessels, and afterwards the *Warrior* made fast to the starboard side of the *Glengaber* and assisted to hold her. The *Glengaber* was afterwards towed by the *Warrior* and another tug to the Alfred Basin at Birkenhead. The owners of the *Glengaber* had instituted a suit for damage against the *Black Prince*, and in this suit the court had pronounced that the *Black Prince* was to blame for the collision. It appeared in evidence that some of the owners of the *Warrior* were owners of the *Black Prince*.

The Salvage suit came on for hearing on the 13th of June, and the hearing was continued on the 14th.

535] **Aspinwall*, Q.C., and *W. C. Gully*, appeared for the plaintiffs: *Milward*, Q.C., and *Myburgh*, for the defendants.

SIR ROBERT PHILLIMORE. I have already decided that the *Black Prince* has failed in her defence as defendant in the suit of collision brought by the *Glenaber* against her, and I am of opinion that she cannot recover in this court salvage reward for services which were rendered necessary by her own misconduct. I shall therefore dismiss the claim of the *Black Prince* with costs. With regard to the *Warrior* it has been contended that that vessel is not entitled to be considered as a salvor, because it appeared in evidence that some of her owners were also owners of the *Black Prince*. This objection, if allowed to prevail, could not affect the claim of the crew, nor could it affect those owners of the *Warrior* who are not owners of the *Black Prince*, and in my opinion it cannot be sustained. I know of no authority for the proposition that a vessel wholly unconnected with the act of mischief is disentitled to salvage reward simply because she belongs to the same owners as the vessel that has done the mischief. I shall therefore hold that the *Warrior* is entitled to salvage reward.

[The learned Judge then proceeded to consider the circumstances affecting the amount of the reward, and awarded salvage to the *Warrior* and the *Sir George Grey*.]

Solicitor for the plaintiffs: *Wright, Stockley, & Wright, Liverpool*.

Solicitors for defendants: *Duncan, Hill, & Parkinson, Liverpool*.

May 6, 1872.

*THE CHARLES.

[536

[Law Reports, 8 Admiralty and Ecclesiastical, 536.]

Salvage — Services rendered on the High Seas by putting two of the Crew of a Ship on board a Vessel in distress for want of Hands — Right of Owners, Master, and Crew to participate in Salvage Reward.

A ship fell in on the high seas, in the winter season, with a brig in distress for want of sufficient hands to work her. The master of the ship sent two of his crew, who had volunteered to go, on board the brig and by their assistance the brig was navigated safely into a British port. In consequence of the absence of the two men, the ship was exposed to risk, and the remainder of her crew had to undergo extra labor:

Held, that not only the two men who went on board the brig, but the master and owners of the ship and the rest of the crew of the ship, were entitled to salvage reward for the services rendered.

THIS was a cause of salvage instituted on behalf of the owner of the ship *Jarius B. Lincoln*, and of the master and crew thereof, against the brig *Charles* and the cargo lately laden therein, together with the freight due for the transportation thereof, and against the owners of the said brig and the owners of her cargo intervening. The owners of the *Charles* and the owners of her cargo appeared separately and filed separate answers.

The cause now came on for hearing, and the facts admitted

1872

The Charles.

by the pleadings and proved in evidence were as follows: The *Charles*, a brig of 246 tons register, having taken in a cargo of palm-oil and nuts, was on the 15th of November, 1871, lying in the Congo river, when the master when ashore on business connected with the vessel, in one of her boats, taking with him a crew of four hands, and leaving the mate and two seamen and the cook on board. During the night, and while the master and the boats' crew were ashore, a strong current caused the *Charles* to drag her anchor into deep water, and carried her out to sea; and the mate, thinking it would be attended with risk to attempt to work back to the Congo, shaped his course to Liverpool. On the 28th of January the *Jairus B. Lincoln*, an American ship of 1814 tons register bound for Falmouth, for orders, with a cargo of guano, and manned by a crew of twenty-two hands, all told, fell in with the *Charles* in latitude $46^{\circ} 30' N.$, and longitude $18^{\circ} 45' W.$ The *Charles* had her flag half-mast 537] high, and her mate asked the master *of the *J. B. Lincoln*, whether he could spare a couple of hands to assist him to navigate his vessel. The mate of the *J. B. Lincoln* boarded the brig, and he found that one of the seaman who were on board the brig when she had been carried out to sea had died of fever the other seaman was ill with the scurvy, and was just recovering from an attack of dysentery, and could render little or no assistance in working the vessel and the mate and cook were much exhausted, for the brig had encountered a heavy gale a few days previously. The master of the *J. B. Lincoln*, out of several of his crew who volunteered to go on board the brig, selected two able seaman who went on board the brig. The mate of the brig gave a written acknowledgment to the master of the *J. B. Lincoln*, in the following form:

"I hereby acknowledge to have received two men from the ship *J. B. Lincoln*, and that I will pay all expenses attached thereby; as my vessel is in distress for want of men, and cannot bring her in without help."

The *J. B. Lincoln* then proceeded on her course, and the brig made for Cork. The standing rigging of the brig was in bad order, she was badly found in provisions, and had no lime-juice vinegar, or vegetables on board, and no medicine. The brig, according to the statement contained in a protest made by her mate, "met with an almost constant succession of strong winds and heavy seas, in which the vessel labored and rolled heavily and shipped large quantities of water over all, at times completely flooding the decks both fore and aft, the pumps being attended in the best manner possible until the 8th of February, when at 11 A.M., being off Point Lynas, we received on board a Liverpool pilot." On the 9th of February the brig was taken

into dock at Liverpool in safety. In consequence of the absence of the two men, the *J. B. Lincoln* and her crew ran risk and danger, and her crew underwent extra labor. It was agreed that the value of the *Charles* and freight was 1495*l.*, and the value of her cargo, after deducting freight, expenses of discharging, and other proper deductions, was 6679*l.*

Butt, Q.C., and *T. H. James*, for the plaintiffs. This was a *salvage service, and the owners, master, and crew are all [538 entitled to salvage reward: *The Active* (1); *The Roe* (2).

Myburgh, for the owners of the *Charles*. The only persons who can be said to have rendered salvage services are the two men who went on board the brig. They are not entitled to claim salvage reward, because they went on board the brig on the terms of the written agreement. By the agreement the services of the men were given on the terms that their expenses only should be paid.

Milward, Q.C., and *W. F. G. Phillimore*, for the owners of the cargo. The written agreement bars the claim to salvage reward at all events as against the owners of the cargo. The men agreed to give their services on the terms that their expenses should be paid by the master of the ship as the agent for the owners of the ship.

Butt, in reply.

SIR ROBERT PHILLIMORE. I am clearly of opinion that the putting these two men on board the *Charles* under the circumstances shown in the case gives a right to salvage reward to the owners, master, and crew in due proportions, according to their respective merits. The written agreement, which has been relied upon by the counsel for the defendants, may, I think, be entirely laid aside in considering the question of salvage. I consider that that document was merely intended as a security that whatever happened the expenses of the two men who went on board the brig should be paid by the owners of the *Charles*.

With respect to the owners, the Court is inclined to think that they are not entitled to a large reward, as the ship itself did not render any assistance. Still the court considers that they are entitled to some reward, as the ship and crew seem to have been subjected to very bad weather, and the period of the year at which the service was rendered made the risk of parting with two of the crew very considerable. Then the master is also entitled to share, as it was upon his responsibility that the two men were sent on board the *Charles*. It cannot, however, be doubted that the principal salvors were the two men who went on board the *Charles*, and it is impossible to read the protest made by the mate, and to hear the evidence without being convinced that a

(1) 14 Jur. 606.

(2) Sw. 84.

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The *Ida*.

539] material service was *rendered. The two men had to put up with great discomfort and distress from the want of food and medicine; their labor was exhausting, and they ran risk from the ill health of the others on board the *Charles*. The value of the ship and cargo was 8174*l*. I shall award in respect of this service the sum of 400*l*. Of this I consider the two men who went on board the *Charles* are entitled to 200*l*. to the crew left on board the *J. B. Lincoln* I shall apportion the sum of 100*l*. to compensate them for the extra labor thrown upon them by the absence of the other two. To the owners I give 50*l*. and to the master 50*l*.

Solicitors for plaintiffs; *Bateson, Robinson, & Morris, Liverpool*.

Solicitors for owners of the *Charles*: *Thornely & Archer, Liverpool*.

Solicitors for owners of cargo: *Waltons, Bubb, & Waltons*.

August 8, 1872.

*THE *IDA*.

542]

[Law Reports, 3 Admiralty and Ecclesiastical, 542.]

Bottomry Bond given to procure release of British Vessel under arrest at a Foreign Port not upheld.

In 1867 an English vessel, then at Monte Video, was chartered by W. to proceed with cargo to certain ports in South America. She took in the agreed cargo, and sailed according to orders, first to one and then to another of the ports of discharge named in the charter. A portion of the cargo was delivered, but the master failing to obtain any directions for the discharge of the residue, after considerable delay and after notice to the consignee, sold it to defray expenses. The vessel after having been several other voyages, arrived at Buenos Ayres in 1868, and procured a charter to an English port. After this last mentioned charter had been entered into, W. instituted legal proceedings at Buenos Ayres to recover damages for the non-delivery of the cargo shipped by him, and caused the vessel to be arrested for the damages so claimed. The arrest was under process valid according to the law in force at Buenos Ayres. By the advice of the British consul at Buenos Ayres, the master agreed with W. to compromise the dispute by giving to W. a bottomry bond for a sum of money considerably less than the amount claimed by him. The bond was given, and the vessel was released.

In a suit instituted on behalf of W. and his partner in trade against the vessel after her safe arrival home to enforce the bond:

Held, that the circumstances under which the bond was given rendered it incapable of being enforced.

THIS was a bottomry suit instituted on behalf of Messrs. Wilson and Stevenson, merchants, against the schooner *Ida* and her owners, the defendants intervening.

543] *The petition stated, that in the month of April, 1868 the *Ida*, belonging to the port of Whitstable, was lying at Buenos Ayres, bound on a voyage to Liverpool. Money being necessary to enable the vessel to prosecute her voyage, and her master being without funds or credit, he was obliged to, and did, borrow from the plaintiffs on bottomry the sum of 450*l*.

By reason of the said advance the said vessel was enabled to, and did, prosecute her said voyage to Liverpool.

The answer was in substance as follows :

1. On or about the 13th day of August, 1866, the schooner *Ida* left the port of Glasgow, on a voyage to Monte Video, under the command of Henry Pearson Coleman, her master. The *Ida* arrived at Monte Video on or about the 17th day of November, 1866.

2. In the month of February, 1867, the *Ida* being still at Monte Video, was, by a charterparty dated the 12th day of that month, chartered by the plaintiff Robert Wilson, to receive from the plaintiff, or his order, a cargo of coals and other merchandise, and to proceed therewith to Corrientes, Paso de la Patria, or Cerrito, not higher than the Brazilian squadron was stationed, or as near thereunto as she might safely get, and deliver the same, on being paid freight at 40s. per ton; the vessel to be consigned to charterer's agents at port of discharge.

3. Under the said charterparty, the plaintiff, Robert Wilson, loaded, or caused the *Ida* to be loaded, with a cargo consisting of 202 tons of coal and 940 bags of bran. The said coals were the property of the plaintiff, Robert Wilson, but the said bran belonged to some other person or persons. The plaintiff, Robert Wilson, before the *Ida* left Monte Video, in performance of her said charterparty, upon the application of her master, made him an advance on account of the freight on the said coals, by giving to the said master the bill of him, the said plaintiff, on himself, at two or three months' date, for 404l. The said master was unable to get such bill cashed, and the said plaintiff thereupon cashed it for the said master for its amount, less 6l. per centum for interest and insurance; and he also deducted and retained a commission of 2l. 19s. per cent. on the freight of the said coals.

4. The *Ida* duly proceeded with the said cargo to Corrientes, where she arrived on the first day of June, 1867.

5. Before leaving Monte Video with the said cargo, the master of the *Ida* received from the plaintiff, Robert Wilson, a letter addressed to "Don Candido Gomez, consignee, per *Ida*," with instructions from the said Robert Wilson that such letter was for his consignees.

6. Upon the arrival of the *Ida* at Corrientes, the master of the *Ida* duly delivered the said letter, and made every due endeavor to obtain directions as to the discharge of the said cargo, and was ready and willing to proceed with the discharge thereof; but the plaintiff, Robert Wilson, and his consignees did not, nor would, receive the said cargo, and made default in giving directions as to the discharge thereof, and detained the *Ida* at Corrientes until the 25th day of the said month of June, when, and not before, the master of the *Ida* received orders as to the discharge of the said cargo, and was ordered to proceed therewith to Paso de la Patria, and there discharge the same.

7. *The *Ida* forthwith proceeded to Paso de la Patria with the second cargo, [544 and arrived there on or about the 27th day of the said month of June, and the master of the *Ida* became entitled to have the said cargo received by the plaintiff, Robert Wilson, or his consignees, within a reasonable time, or within the time allowed by the custom of the port; but the plaintiff, Robert Wilson, and his consignees, did not, nor would, receive the cargo within such time as aforesaid, but up to the 27th day of the month of July, 1867, received only about one-half of the said cargo, and after that day did not, nor would, receive any further part of the said cargo; and the said ship was thereby detained until the 2d day of August, following, when the master of the *Ida*, being unable to get the residue of the said cargo received by the said Robert Wilson or his consignees, and to obtain the freight for the carriage thereof, and having been put to great expense by the aforesaid detention of the *Ida* at Corrientes, and the refusal and decision of the plaintiff, Robert Wilson, and his consignees to receive the said cargo, and being in consequence thereof in want of funds to defray the necessary expenses of the *Ida*, on the said 2d day of August, 1867, sold a portion of the cargo of coal, and on or about the 5th day of the said month of August returned with the *Ida* to Corrientes, where he sold the rest of the said coals remaining on board the *Ida*. The said coals were sold by the said master with a view to obtaining payment of

the balance of freight and his claims for demurrage and expenses caused by the detention and refusal aforesaid.

8. The *Ida* then made divers other voyages with other cargoes, after the completion of which she proceeded to Buenos Ayres in performance of a charter which had been obtained for her by her master to load a cargo there for carriage thence to Liverpool. She arrived at Buenos Ayres on or about the 10th of February, 1868, and commenced to load her said cargo for Liverpool.

9. Subsequently thereto, and whilst the *Ida* was still at Buenos Ayres and loading her cargo, the master of the *Ida* was summoned before the national tribunal of that place to answer the claim of the plaintiff, Robert Wilson, against the said master, in respect of the aforesaid sale by him of the aforesaid coals. By the advice of the British consul at Buenos Ayres, the said master consented to pay the said plaintiff, Robert Wilson, the sum of 450*l.*, being not only the full value of the cargo, a sum of money in respect of expenses alleged by the said plaintiff to be caused to him through the non-delivery to him or his consignees of the said coals, and ultimately, by the advice of the said consul, the master of the *Ida* executed a bottomry bond, set forth in the petition. No money passed upon the making of the said bond, which was given to secure the said sum of 450*l.* so agreed to be paid by the said master to the plaintiff, Robert Wilson, together with 20 per centum thereon as a premium, and not for any other purpose.

10. At the time of the making of the said bond the said Robert Wilson was liable and indebted to the master and owners of the *Ida* in a large sum of money, by way of demurrage and expenses of the aforesaid detention of the *Ida*, and the plaintiff has ever since been, and still is, so liable and indebted.

11. The defendants allege that the said charterparty of the 12th day of February, 1867, was entered into by the plaintiff, Robert Wilson, on behalf of himself and the plaintiff, Ebenezer Campbell Stevenson, who was and is the partner in trade of the said Robert Wilson.

12. The defendants allege that, under the circumstances hereinbefore set forth, 545] *the master had no authority to grant the said bond, and that the said claim of the said Robert Wilson was not a fit subject for bottomry, and that the said bond was and is null and void.

The reply filed on behalf of the plaintiffs contained the following allegations:

1. The master of the above named vessel *Ida* wrongfully and improperly sold the said coals, in the answer in this cause mentioned, and thereupon and by reason thereof the defendants became and were liable to pay to the said Robert Wilson a large sum of money for the said coals, and for damages occasioned by the sale thereof.

2. By the law in force in Buenos Ayres the said Robert Wilson, as the owner of the said coals, had a lien on the above named vessel *Ida* for the value of the said coals and for the damages, and such lien could be enforced by the arrest and sale of the said vessel.

3. On the return of the said vessel to Buenos Ayres, as in the said answer mentioned, the said Robert Wilson commenced an action in the national court there against the said ship (the said court being a court having jurisdiction in the premises) to recover the value of the said coals and the said damages, and the said ship was arrested in such suit.

3. After the said action was so commenced and the said ship arrested, and whilst the said action was in course of prosecution, the said master, on consultation with Her Majesty's consul at Buenos Ayres, who was also acting as agent to the owners of the said vessel *Ida*, requested the said Robert Wilson to withdraw such proceedings on being paid as a compromise the sum of 450*l.*, instead of a larger sum claimed by the said Robert Wilson.

5. The said Robert Wilson agreed to accept such sum of 450*l.*, and the said master having no funds or credit, he and the said consul duly advertised in the newspapers for the loan thereof on bottomry, but inasmuch as no person could be found willing to make such advance, the said Robert Wilson was requested by the said master and the said consul to make such advance on behalf of his Liverpool firm of Wilson & Stevenson, which request the said Robert Wilson com

plied with, and accordingly the bond set forth in the petition was executed, and the said schooner *Ida* was freed from the arrest of the said court, and the said suit compromised. The said bond was drawn up by filling in a common printed form of bottomry bond, as by the production of the said bond at the hearing of this course will more fully appear.

6. By reason of the premises the sale of the said vessel by the said national court to satisfy the said claim of the said Robert Wilson was prevented, and the said vessel was enabled to prosecute her said voyage to Liverpool.

7. Save as herein appears the several allegations of the answer are untrue.

On the 31st of July and the 1st of August, 1872, the cause was heard. The depositions of witnesses taken under a joint commission at Buenos Ayres were put in evidence, and witnesses were examined *vivâ voce*. It appeared from the deposition of a lawyer in practice at Buenos Ayres that the national tribunal there has jurisdiction to arrest a ship in an action to recover damages for non-delivery of cargo, and it appeared from [546 other evidence that the *Ida* had been arrested in due form of law at the suit of Robert Wilson as alleged in the third article of the reply. It further appeared that the owners of the *Ida* had written to Mr. Parish, H.B.M. consul at Buenos Ayres, requesting him to instruct the master of the *Ida* to return with the vessel to England, and should the master refuse to do so to place some one else in charge of the vessel, and have her chartered for England. The result of the rest of the evidence so far as is material appears from the judgment.

Bull, Q.C., and *W. G. F. Phillimore*, for the plaintiffs. By the law of the place where the bond was given the ship was liable to arrest for the non-delivery of the cargo, and she was actually under arrest. It was impossible for her to prosecute her voyage home until she was released. It was necessary to satisfy Wilson's claim in order to procure her release. The owners were anxious to get the ship home, and she was actually under charter to proceed to a home port, and under the circumstances it was obviously prudent to compromise Wilson's claim rather than incur expense and delay in defending a suit in a foreign court. All that was done at Buenos Ayres was done under the sanction of the consul. The circumstance that money did not actually pass between Wilson and the master does not affect the question, because substantially the transaction amounted to an advance of money by Wilson for the benefit of the ship. They cited *The Edmond* ⁽¹⁾; *The Prince George* ⁽²⁾; *The North Star* ⁽³⁾; *The Kurwak* ⁽⁴⁾.

Milward, Q.C., and *Clarkson*, for the defendants. An actual advance of money for the necessities of the ship is the foundation of a valid bottomry transaction. Here there was no advance

⁽¹⁾ Lush, 57, 211; 29 L. J. (P. M. & A.), 78. ⁽²⁾ Lush, 45; 29 L. J. (P. M. & A.), 73. ⁽³⁾ 76; 30 L. J. (P. M. & A.), 128. ⁽⁴⁾ Law Rep., 2 A. & E., 289.

^(*) 4 Moo. P. C., 21.

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of money, the transaction was one merely of account between the parties. The master had no authority to give the bond for such a purpose; he had no authority to compromise the suit; he had no authority to turn an unliquidated into a liquidated claim with a bottomry premium. Wilson's claim, if maintainable at all, would have been overtopped by the defendant's claim for demurrage. Moreover, the claim arose in respect 547] of a previous *voyage, and had no connection with the enterprise on which the ship was engaged at the time the bond was given. The conduct of Wilson and his position with regard to the ship renders it impossible for the Court to uphold the bond. The circumstance that the claim in question was one in respect of which the vessel was under arrest is not by itself sufficient to render the bond valid, because it cannot alter the substantial nature of the transaction: *The Edmond* ⁽¹⁾; *The Osmanli* ⁽²⁾; *The Augusta*. ⁽³⁾ Cur. adv. vult.

W. G. F. Phillimore, in reply.

August 3. SIR ROBERT PHILLIMORE. In this case a question arises as to the validity of a bottomry bond. The material circumstances are as follows: The *Ida* being an English vessel, lying at Monte Video, was chartered by the plaintiff Wilson to receive a cargo of coals and "proceed to Corrientes, Paso de la Patria, or Cerrito," . . . "and deliver the same agreeably to bill of lading on being paid freight as follows: forty shillings sterling in full." The master was to have "an absolute lien on the cargo for the recovery and payment of all freight, dead freight, and demurrage. . . . The vessel to be consigned to charterers' agents at port of discharge. The freight to be paid after true and right delivery as customary at port of discharge."

Two hundred and two tons of coals were loaded. Wilson advanced on account of the freight, under conditions certainly not unfavorable to himself, and on a bill at two or three months' date, 404*l*. This bill Wilson afterwards cashed.

The *Ida* proceeded to Corrientes with a letter from Wilson to Don Candido Gomez, the consignee of the cargo, and with instructions from Wilson to deliver it. The *Ida* arrived at Corrientes on the first of June, 1867. The letter was duly delivered; but Gomez seems not to have appeared; at all events, he referred the captain to one Reis as his agent.

Reis said the *Ida* must go on to Paso de la Patria, but the communication between Reis and the captain was not satisfactory, and the captain, after waiting six days and consulting the 548] captain *of the port, advertised in a newspaper. About the 16th of June, the brother of Gomez appeared, but gave no

⁽¹⁾ Lush, 57; 29 L. J. (P. M. & A.), 78.

⁽²⁾ 7 No. Ca., 322.

⁽³⁾ 1 Dod., 283.

orders. On the 19th of June the captain entered the protest. On the 25th of June this brother of Gomez again appeared with the bill of lading, he gave the bill of lading to Reis and told the captain to take his orders from him. Reis told the captain to go to Paso, and he sailed next day, arriving there on the 27th of June. Three or four days afterwards he met Reis there. Reis began to discharge, and went on discharging slowly till the 25th of July. An arrangement had been made between the captain and Reis by which the former was to be allowed eighteen days for discharging the cargo and forty-eight hours waiting for orders — the rate of demurrage was to be 5*l.* per day.

The consignee had received about 109 tons when, on the 26th of July, the captain wrote the following letter to Reis:

To Victor Reis.

"DEAR SIR — As you are acting agent for Candido Gomez, consignee of the above vessel, cargo of coal and brass, I now enclose you my bill for demurrage and expenses up till Monday next, and trust to have an immediate settlement of the same, or I shall place the cargo into other people's hands, and sell it to defray expenses.

"Your humble and obedient servant,

"Henry P. Coleman."

Then there follows the bill for demurrage, &c., which amounted to 1238 patacoons, I think they are called. Reis never came again for coals. On the 30th of July, Captain Coleman wrote another letter to Reis:

"DEAR SIR — I wrote to you on Friday last, the 26th inst., and sent you my bill for demurrage and expenses; you thought proper not to answer that letter, therefore I am obliged to send you another bill enclosed with this for the said demurrage and expenses, and if you fail in coming to a settlement before forty eight hours after the delivery of this letter, I shall after the expiration of the said forty-eight hours sell the remaining cargo of coals to the highest bidder. Trusting you will come to an immediate settlement,

"I remain, dear Sir,

"Your most humble and obedient servant

"Henry P. Coleman."

No answer was returned to these letters.

On the 1st, 2d, 5th, and 14th of August, the captain sold the remainder of the coals, having returned on the 5th to Corrientes. The money obtained by the sale the captain says was applied *towards payment of balance of freight and claims [549 for demurrage and expenses caused by his detention and the refusal of the consignees to receive the cargo.

The *Ida* then made divers other voyages with other cargoes, and on the 10th of February, 1868, arrived at Buenos Ayres, having previously obtained a charter for Liverpool. While loading her cargo the captain was summoned before the national tribunal at the suit of Wilson, and an embargo was laid upon the *Ida*. The captain found himself in great difficulty; the charterers threatening to withdraw their cargo, and he having no funds. The aid of the consul, Mr. Parish, was invoked, and

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he thinking the claim of Wilson on the whole maintainable, advised a compromise of the conflicting claims for 450*l.*, and that the captain should raise this sum by bottomry and so procure the release of the ship. Mr. Parish says in his evidence.

"After some correspondence with Mr. Wilson, I persuaded that gentleman to accept a compromise, for the payment of all claims, the sum of 450*l.*, which was the estimated value of the coal sold, with some additional expenses thereon. Captain Coleman, acting on my advice, accepted this arrangement, and by so doing the parties who were loading his vessel desisted from their intention to withdraw the charter. Captain Coleman having no money, was unable to pay the amount due to Mr. Wilson, and I had no alternative but to advertise for the money on bottomry; and no person tendering for the same, I induced Mr. Wilson to accept the risk, and to accept payment of his claim in this form. On his agreeing to do so, bottomry bills for the amount of 450*l.*, with an additional premium of 90*l.*, were drawn up and signed in the consulate, and Mr. Wilson withdrew the law proceedings, by a formal act, which I recommended him for his better security to enter into. The prohibition which should have been placed upon the sailing of the vessel was removed, and the ship proceeded to sea."

The bottomry bond was as follows:

"Ten days after my arrival at the port of Liverpool I promise to pay to the order of Messrs. Wilson & Stevenson this my first bill of bottomry, second and third of this tenor and date not paid upon the schooner *Ida*, under my command, and bound on a voyage to Liverpool, being for amount of expenses incurred in this port, which sum of 540*l.* stg., excepting 90*l.* stg., for premium was actually laid out in disbursements and charges for the use of the said schooner, and to enable her to proceed on her present voyage, and for the payment of which sum of 540*l.* stg., in lawful money of Great Britain, ten days after my arrival at Liverpool as aforesaid, I do hereby bind myself, my heirs, executors, and administrators, firmly by these presents, and particularly the said schooner, together with all her tackle and apparel, and it is hereby declared that the same are thus assigned over for the security of the said 540*l.* stg., and shall be delivered to no other use or purpose whatever until payment of this bill or bond is first made, with the premiums due thereon."

550] And the usual conclusion follows: The bond is signed by Captain Coleman, the master, and Mr. Parish, British consul at Buenos Ayres.

The recital as to the money being "actually laid out in disbursements and charges" is untrue; this recital is indeed part of the printed form of the bond; but, nevertheless, I regret to see it, and I am somewhat surprised that it escaped, as it must have done, the notice of the consul.

The fact is, that no money passed at all between Wilson and the captain, and that the bond was not for disbursements or charges, but to obtain the release of the ship seized and detained on what was in truth a matter of account between the parties to it. Was such an instrument, drawn in such circumstances, a legal bottomry bond?

In the case of *The Karnak* ⁽¹⁾ I reviewed at length and carefully considered all the decisions of this Court bearing upon the subject of bottomry bonds granted for the purpose of raising money to obtain the release of a British ship detained in a

(1) Law Rep. 2 A. & E. 289.

foreign port on account of a lien allowed by the municipal law of that port.

I adhere to the principles of law laid down in that case with the greater confidence because they were subsequently approved of by the Privy Council. I think it expedient to refer to two of the authorities cited and relied on by me in *The Karnak* ⁽¹⁾. In the case of *The Prince George* ⁽²⁾, before the Privy Council, their Lordships said :

"If it had been proved that the law of New York gave the lien upon the ship, as suggested, we should have thought, upon the general principle, that where the master cannot in any other way raise money, which is indispensably necessary to enable the ship to continue her voyage, he may hypothecate the ship, this power would extend to a case where the ship might be arrested and sold for a demand for which the owner would be liable. It seems immaterial whether the necessity for funds arises from such a demand, or to pay for repairs, stores, or port duties."

I, do not know, however that the law upon this subject has as yet been carried further than to hold valid an hypothecation on account of a lien by a creditor in a foreign port for the necessary expenses and charges in respect of the ship and crew in that port. It is not necessary to decide whether the principles laid down in *The Prince George* ⁽¹⁾ and *The Karnak* ⁽²⁾ might be *considered to cover the case of a bottomry bond given [551 for the purpose of raising money not to be raised in any other way, and to repeat the language to which I have just adverted, "which was indispensably necessary to enable the ship to continue her voyage," without reference to the character of the expenses to be defrayed by the money received.

I say it is not necessary to make a decision upon this point, because the case before me presents a circumstance which raises another principle of the greatest importance relative to instruments of this peculiar character, namely, the capacity of the particular person to become the obligee of such a bond, or, in other words, the capacity of the captain to grant the bond to Wilson. It is contended by the defendants that the failure of Wilson to fulfil his contract with respect to receiving the cargo by himself or his consignees within a reasonable time at the proper port, caused the expenses in order to defray which the sale of the coal became necessary, which act subsequently necessitated the bottomry bond; and now it is not denied that such default was made by Wilson. His contention is that, nevertheless, on a balance of accounts between him and the captain, the latter is still his debtor; and therefore he arrested the vessel. In *The Karnak* ⁽¹⁾ I cited a decision bearing on this point of Mr. Justice Story, which I will now read. That very learned judge said :

"It is undoubtedly true that material men and others who furnish supplies to a foreign ship have a lien on the ship, and may proceed in the Admiralty Court

⁽¹⁾ Law Rep., 2 A. & E., 240.

⁽²⁾ 4 Moo. P. C., at p. 25.

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to enforce that right; and it must be admitted that in such a case a bona fide creditor who advances his money to relieve the ship from an actual arrest on account of such debts may stipulate for a bottomry interest, and the necessity of the occasion will justify the master in giving it if he have no other sufficient funds or credit to redeem the ship from such arrest. But it would be too much to hold, as was contended for by the counsel for the appellants, that a mere threat to arrest the ship for a pre-existing debt would be a sufficient necessity to justify the master in giving a bottomry interest, since it might be an idle threat which the creditor might never enforce, and until enforced the peril would not act upon the ship itself; and if, supposing a just debt might in such a case be a valid consideration to sustain a bottomry interest in favor of a third person, such an effect never could be attributed to a debt manifestly founded in fraud or injustice. Nor does it by any means follow, because a debt sought to be enforced by an arrest of the ship might uphold an hypothecation in favor of a third person, that a [552] general creditor would be entitled to acquire a like interest. It *would seem, as against the policy of the law, to permit a party in this manner to obtain advantages from his contract for which he had originally stipulated. It would hold out temptations to fraud and imposition, and enable creditors to practice gross oppressions, against which even the vigilance and good faith of an intelligent master might not always be a sufficient safeguard in a foreign country."

That is the case of *The Aurora*. ⁽¹⁾

Now, by accepting this bottomry bond Wilson has not only converted a personal debt into a bottomry transaction, but he has as Mr. Clarkson clearly and forcibly said, turned an unliquidated into a liquidated claim with a bottomry premium. I am of opinion that it was not competent to him to take this step. I agree with the opinion of my predecessors in this chair, that bottomry bonds ought to be, so to speak, favored by this Court; that is, that the interests of commerce require that they should not be invalidated upon technical or minute grounds. But to pronounce for the validity of this bond in the circumstances which I have stated, and in the hands which now hold it, would be to introduce a new principle into the law relating to these instruments, which would be, I think, contrary to the foundation on which they rest, and not conducive to the interests of commerce. I must decree in favor of the defendants, with costs.

Proctors for the plaintiffs: *Toller & Sons*.

Solicitor for the defendants: *Thomas Cooper*.

(1) 1 Wheaton, 96.

CHANCERY APPEALS.

L.C. May 27, 28; June, 5. 1872. 1871 L. 33.

**LARIVIERE v. MORGAN.*

[550]

[Law Reports, 7 Chancery Appeals, 550.]

Foreign Government — Enforcing Contract — Deposit in this Country — Payment — Certificates refused.

Where a foreign government has made a contract in this country, and has lodged money in the hands of agents in this country for payment of the sums to become due under the contract, the Court will not refuse relief to the contractor because the contract was with a foreign government, nor because the foreign government does not appear before the Court.

Where goods are to be paid for when received, and money is lodged for payment on the production of certificates from an agent of the purchaser, the Court, if certificates are refused, may direct an inquiry and order payment of what is due to the contractor who has supplied the goods.

The French government contracted in *England* for the purchase of a large number of cartridges, which were to be inspected, and when accepted were to be paid for through the French ambassador; and bankers in *England*, who had in their hands funds belonging to the French government, wrote to the contractor in *England* that a special credit for £40,000 had been opened in his favor, and would be paid to him upon receipt of certificates from the French ambassador. Some cartridges were supplied and paid for, and others were delivered to agents for the French government; but other agents of the French government alleged that the time for the delivery had expired. Certificates were refused, and the bankers refused to make any further payments. The contractor thereupon filed his bill against the bankers and the French government, praying to have the balance of the £40,000 brought into Court, and for an inquiry and payment. The French government did not appear. The bankers were ordered to bring the money into Court; and the contractor was declared to be entitled to payment for all cartridges delivered under the contract; and inquiries what cartridges had been delivered were directed.

Decree of *Malins*, V.C., affirmed, with variations.

P. A. *LARIVIERE*, the plaintiff in this case, and one *E. B. des Minières*, in November, 1870, entered into a contract with *Leon Gambetta*, who was then acting as Minister of War for the committee or government of the national defence in *France*, and the other members of that committee or government, acting by *M. Joulin*, their agent in this country. This contract was dated the 30th of November, 1870, and was signed by the Minister of War and *M. Joulin*, and was, as translated, in the words following:

“ War Department.

“ Contract with Messrs. *Bellet des Minières* and *Larivière* to supply ball cartridges for rifles, model 1866.

““ Between the undersigned, *M. Bellet des Minières* and [551] *M. Larivière*, both of whom reside in *London*, and the minister of war, represented by *M. Joulin*, his delegate in *London*, the following agreement has been made:

“ Messrs. *Bellet des Minières* and *Larivière* engage themselves to supply the French government 20,000,000 ball cartridges for

rifles according to model 1866, at the rate of 150 francs per 1000.

"The delivery will take place in *London*, in lots of 25,000 or more, in cases or barrels of uniform model, containing about 3000 each.

"These cases or barrels will bear particular and distinct marks indicating their contents and the model of the cartridge.

"Out of the 20,000,000 cartridges to supply, 7,000,000 must be delivered before the 5th of December, and the remainder before the 10th of January, 1871; and time will be considered the essence of the contract.

"The cartridges will contain five grammes (French weight) of fine English musket powder, and will be tried in *London* by a French delegate charged with this office, who will deliver a certificate stating that the cartridges are efficient for war service, and serviceable for the rifles of the model 1866.

"Experiments will be made by trying fifty cartridges taken out of the bulk of each lot, and must not contain more than 5 per cent rejected.

"Any lot containing a greater percentage of rejected cartridges will not be accepted.

"The lots will, immediately after having been duly accepted on the responsibility of the delegate of the Minister of War in *London*, be paid for through the care of the French ambassador, who will issue checks for the amount.

"The contractors cannot claim acceptance of any of the merchandise after the 10th of January, 1871, and cannot claim any indemnity for goods supplied after the hereinbefore stipulated time."

In consequence of the war and the difficulties in communication the plaintiff, as he alleged, before incurring the responsibility of buying materials, &c., required the delegates of the committee of national defence to deposit in the hands of the defendants *Morgan & Gooch* a sum of £40,000. Messrs. *Morgan & Gooch* were *bankers in *London*, and, as financial agents for the then French government, had lately raised a loan of £10,000,000, in respect of which they had large sums of money in their hands, and by the direction of M. *Joulin*, who, under the orders of the then French government, had a large credit with them, they wrote to *Larivière* and *Des Minières* a letter, dated the 1st of December, 1870, as follows:

"Gentlemen,— We are instructed by Mr. *L. Joulin* to advise you that a special credit for the sum of £40,000 (say forty thousand pounds), equivalent to frs. 1,000,000 (one million francs), has been opened with us in your favor, and that it will be paid to you rateably as the goods are delivered upon the receipt of

L.C.

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certificates of reception issued by the French ambassador or by Mr. *L. Joulin*.

"We shall require receipts in duplicate for the payment or payments as made, and the surrender of this letter on the final payment under it being made."

Des Minières afterwards withdrew from the contract, and *Larivière* alone proceeded with it, bought materials, and employed people to make cartridges. He supplied 70,000 cartridges, which were accepted by the agents of the French government, and duly paid for by *Morgan & Gooch*. *M. Joulin* afterwards gave directions for alterations to be made in the manufacture, and promised, as *Larivière* alleged, to obtain a prolongation of the time, and the plaintiff alleged that in consequence of these alterations he was prevented from delivering the rest of the cartridges by the 10th of January, 1871.

On the 13th of January, 1871, Messrs. *Morgan & Gooch* sent a letter to *Des Minières* and *Larivière*, as follows:

"Mr. *Joulin* now informs us that, as the time has already expired within which the deliveries of goods were to be made, and to pay for which this credit was opened, no further deliveries can be made under it, and we are not to make any further payments in virtue of it.

"Under these circumstances, in accordance with his instructions we request that you will return us our letter dated the 1st ultimo, and take note that the credit advised therein is withdrawn and cancelled."

Some cases of cartridges had, however, been duly inspected and accepted by the officers of the French government on the 10th of January, and others were inspected after the 13th of January, but the officers afterwards refused to inspect or accept any more cartridges. The agents had, moreover, refused to grant certificates for those which had been accepted.

M. Larivière, therefore, being unable to obtain payment for these cartridges, in February, 1871, filed a bill against *Morgan, Gooch, Des Minières*, and the nine persons who had, in November, 1870, formed the committee or government of the National Defence, which bill was afterwards amended by striking out the nine members of the government as defendants, and making the French republic a defendant.

The bill as amended stated as above mentioned, and alleged that the government was, in January, 1871, engaged in negotiating terms of peace, and accordingly its officers and agents, vexatiously and contrary to good faith, refused to grant proper certificates as to the cartridges; that the plaintiff had 2,000,000 of cartridges on hand, and had been obliged to dispose of plant

and materials at a ruinous loss. And the bill prayed a declaration that *Morgan & Gooch* held the residue of the £40,000 upon trust to pay to the plaintiff the sums due to him under the contract, and as a security to him for the payment of these sums, and prayed for inquiries and accounts, and for an injunction to restrain *Morgan & Gooch* from parting with the residue of the £40,000.

Morgan & Gooch, by their answer, said that they had had large sums of money in their hands, which they held pursuant to the orders of the French government of National Defence, and when directed by that government to open a credit with any person, they did so accordingly; but from time to time, under the direction of that government, they carried the balance standing to any particular credit back to the general account of the French government. No separate credit was opened in their books with respect to this particular contract, but a note was made on M. *Joulin's* account; and in pursuance of proper certificates as to the cartridges, they had paid £5,313. They professed ignorance as to most of the matters in question in the suit, and stated that the government of National Defence 554] had long ceased to exist, *and that the moneys in question were now the property of the French republic.

Some evidence was entered into by the plaintiff which, as appears from the judgments of the Vice-Chancellor *Malins* and the Lord Chancellor, was not sufficient to show what he was entitled to be paid. The defendants *Morgan & Gooch* did not enter into any evidence, and the French republic did not appear.

The suit came on to be heard before the Vice-Chancellor *Malins*, who directed that the French government should be respectfully invited to appear and contest the matter. The French ambassador, however took no notice of the invitation, and the suit came on to be heard in the absence of the French government.

The Vice-Chancellor made a declaration that the plaintiff was entitled to be paid out of the £40,000, and that the time had been waived by the French government: and he directed inquiries accordingly, and ordered the balance of the £40,000 to be brought into Court (¹).

(¹) 1872. March 5.

SIR R. MALINS, V.C.:

His Honor stated the facts of the case, and said that it was clear that the plaintiff had required this separate account to be opened, and that without it he would not have entered into the contract. It was true that the plaintiff was entitled to payment out of this account only on the production of the

proper certificates by M. *Joulin*, or by some other agent, but it did not follow that because M. *Joulin* refused to give any certificate *Morgan & Gooch* were to be at liberty to repudiate the rights of the plaintiff. Could it be contended that the French government were at liberty to induce the plaintiff to enter into this contract on the faith of this deposit, and the very next day to re

*The defendants *Morgan & Gooch* appealed. [555]

Mr. Pearson, Q.C., and Mr. C. Hall, for the Appellants:

If this money had been set apart, and made a separate credit for the plaintiff, the case might be different; but it was merely a special credit on certain conditions. If the plaintiff had the certificates, perhaps *Morgan & Gooch* would have been liable; but he asks the Court to decide whether the certificates ought not to have been given, that is, to enforce a contract against a foreign government; and this the Court cannot do. It is true that *Morgan & Gooch* are before the Court, but to order them to pay would be merely to do that in an indirect manner which the Court could not do directly. We have always held these moneys entirely at *the disposition of the French government, and [556] the Court cannot, in the absence of that government, decide

quire *Morgan & Gooch* to re-transfer the deposit? Of course no foreign government could be sued in this Court, as was clearly laid down in *Wadsworth v. Queen of Spain* (17 Q. B. 171), nor could the agents of a foreign government be sued: *Gladstone v. Ottoman Bank* (1 H. & M., 505); and if there had been no deposit, no bill like this for the execution of a contract could have been maintained. But here it was the very object of the plaintiff to have a deposit in this country as a security.

Then *Morgan & Gooch* said that the contract had not been performed, and in this there was the difficulty that the French government did not appear, though they had been most respectfully invited to submit the question to the Court. Still *Morgan & Gooch* had engaged to hold this money for the benefit of the plaintiff if he performed the contract, and until it was ascertained that he had not done so, they could not be at liberty to hand the money back to their principals. They must be considered as stakeholders, and as bound to bring the money into Court, to abide the decision of the Court as to whether the contract was or was not performed.

Although the French government had not appeared, and although Messrs *Morgan & Gooch* had entered into no evidence beyond their answer, still they had appeared and had argued the case, not as stakeholders, but really on behalf of the French government. A decree must be made for an inquiry whether the plaintiff had performed the contract, and as to what was due to him under it; and the French government must be invited to appear on the inquiry; and

if the French government did not appear, the inquiry must go on in their absence.

On the question of law whether, when a British subject had contracted with a foreign government to deliver goods, and had required the security of a deposit, the foreign government could keep the goods and withdraw the deposit, *Gladstone v. Musurus Bey* (1 H. & M. 495) was an authority; and though the order was there made upon an interlocutory application only, it followed that a similar order would be made at the hearing; and, as was said in that case, although the Court cannot proceed against an ambassador, it has jurisdiction over the fund. So, if a foreign government contracted a loan in this country, and as a security for payment of interest, deposited a certain sum of money in the hands of bankers here, it was clear that the foreign government, having obtained the loan, would not be allowed immediately to withdraw the fund so deposited.

No doubt *Morgan & Gooch* were not bound to pay the plaintiff without the certificates, but it did not therefore follow that the fund was not liable to the plaintiff, for the question in this case was whether he had performed his contract. In *Scott v. Liverpool Corporation* (28 L. J. (Ch.) 230; 5 Jur. N. S., 105), where the production of the certificates by the engineer was a condition precedent to the payment, and the engineer, without any fraud, refused to give the certificates, the Court refused to decree payment. But where there was fraud, payment had been decreed. Here the evidence of the plaintiff was that the

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what directions that government ought to give: *Wadsworth v. Queen of Spain* ⁽¹⁾; *Gladstone v. Musurus Bey* ⁽²⁾; *Gladstone v. Ottoman Bank* ⁽³⁾; *Smith v. Weguelin* ⁽⁴⁾. How can the inquiry be prosecuted in the absence of the government which is solely interested in the matter? The agreement was that the money should be paid on the production of the certificates, and the Court can neither order payment without the certificates, nor compel the French government to give them. If *Morgan & Gooch* pay this money without certificates, what answer will they have when their principals claim the money? No doubt, in some such cases, where the certificates have been fraudulently or wrongfully withheld, the Court has tried to do justice, and has dispensed with them, but the Court cannot hold that a foreign government has acted fraudulently or wrongfully. If the plaintiff has any claim, he can enforce it in *France*. The form of the decree shows the impossibility of granting what is asked, for the decree does not order payment, but merely directs an inquiry whether anything is due.

Mr. Glasse, Q. C., and Mr. Davey, for the plaintiff:

We admit that without further evidence a decree cannot be made; but there is evidence enough for an inquiry. As to the separate credit, we have nothing to do with the way in which *Morgan & Gooch* keep their books, and if they did not carry this £40,000 to a separate account, they ought to have done so. If, under similar circumstances, the principals had become bankrupts, would this money have remained in their order and disposition? It is true that the party liable is a foreign government, who cannot be compelled to appear; but the money is in this country, and the simple question is whether the bankers who hold it are not liable to the plaintiff. When a foreign government puts money into the hands of its agents in this country, it must know that the money will be subject to the laws of this country; in fact that was the object of the plaintiff in requiring 557] the money to be *deposited here. In the case of the *Prince Frederick* ⁽⁵⁾ there was no such contract. There is no difference between this case and that of an ordinary defendant who is out of the jurisdiction, which has never been held to prevent the Court from doing justice as far as it can. The French government can come in and make such defence as is possible, but the plaintiff must not be injured because the French govern-

agents of the French government had acted unfairly and oppressively, for of course any government might have unfair and dishonest agents; and if it should be made out that the agents had so acted, and that the certificates ought to have been given, then the plaintiff was entitled to the relief he asked.

⁽¹⁾ 17 Q. B., 171.

⁽²⁾ 1 H. & M., 495.

⁽³⁾ 1 H. & M., 505.

⁽⁴⁾ Law Rep. 8 Eq., 198.

⁽⁵⁾ Cited in *De Haber v. Queen of Portugal*, 17 Q. B., 212.

ment does not choose to do so. Even if they do not, it is perfectly competent to *Morgan & Gooch* to show on the enquiry that nothing is due to the plaintiff. There, is no doubt, a difficulty as to the form of the decree, inasmuch as the Court cannot at present make any declaration of rights; but that has been occasioned entirely by the absence of the French government. We want a declaration that the defendants are stakeholders, and then we have the inquiry. We shall claim for the cartridges delivered, and for those inspected and approved, and for those properly tendered for inspection. It will be open to the defendants to show that we are entitled to nothing. As to damages for waste of machines and material, we admit that there is a difficulty.

Mr. Pearson, in reply :

The plaintiff cannot claim for cartridges which were inspected by inspectors scattered over the country, and ignorant of what had taken place. We say that there was a breach of contract by the plaintiff, and the French government had a right to put an end to the contract. The only foundation for the bill is want of good faith on the part of the French Government; and of that there is no evidence whatever. The plaintiff does not even pretend that *Morgan & Gooch* are guilty of collusion. It is clear that the plaintiff could not recover at law, as he has not the certificates, and then he asks to have the money brought into Court in order to obtain an equity. He did not bargain for anything of the kind; all he wanted was to know that there was money to pay him with. But that money was to be dealt with according to the agreement, and the French government were to have a right to refuse the certificates if they disapproved of the cartridges. That was all that the plaintiff bargained for, and for the Court to decide whether he ought to have the certificates giving him much more.

*In *Central Railroad and Banking Company of Georgia v. [558 Mitchell* (1) the money was sent there for distribution. In *Sterenson v. Anderson* (2) the bill was filed by the stakeholder himself. Here the party liable is a foreign government, against which the Court has not the same jurisdiction as it has against a subject of this country.

June 5. LORD HATHERLEY, L.C., after stating the facts of the case, and that the contractors were desirous of having some assurance that in the then troubled state of *France* they should not be obliged to have recourse to that country for payment, continued :

Now no one can suppose that after the letter of the 1st of

(1) 2 H. & M., 452.

(2) 2 V. & B., 407-411.

December had been written it was to be the option of the French government to retire from that agreement, and that Messrs. *Morgan & Gooch* could, upon an order from the French government, transfer that sum of money to some other account. It appears to me that, in other words, there was a plain and clear trust impressed on this fund, under which those who had the benefit of the trust would be entitled, if they performed their contract, to receive the money.

Of course the goods were to be delivered according to the contract, and in accordance with all the conditions of the contract, including the condition of time, unless that condition had been waived. But the evidence of the fulfilment of those conditions which would justify Messrs. *Morgan & Gooch* in making payment was to be the certificate of the French ambassador or of M. *Joulin*, who had been the agent of the French government, and under whose control the general funds of the French government stood with Messrs. *Morgan & Gooch*. And though Messrs. *Morgan & Gooch* would be perfectly justified in declining to make any payment except upon the evidence which they were told to accept, that does not affect the question whether the absence of the certificate of reception can have such an effect as, at the option of the French ambassador or M. *Joulin*, to deprive the contractors of the benefit of the engagement which had been entered into with them.

This is not like one of those cases in which goods are to be
559] *tested by an engineer and paid for upon his certificate, which certificate he refuses to sign. In those cases the parties have chosen their own judge as to the proper fulfilment of the contract, and if the engineer declines to certify, the Courts have held that, in the absence of all fraud on his part, the certificate is a *sine qua non*, and that accordingly the contractor, having submitted to that condition, must abide by it if the goods are not such as the engineer will certify for. But here neither the ambassador nor M. *Joulin* are to try the cartridges, about which they would know nothing; although they would know whether the cartridges, when tried and approved, had or had not been received by the French government. If, therefore, the French government receive the cartridges, it is then to be taken that the proper certificate has been given.

It is not required that this certificate shall be a condition preliminary to payment. The condition for payment is, that the goods shall be delivered and received. Supposing that the ambassador were changed, or that some one was appointed in the place of M. *Joulin*, then I apprehend that the Court would say that payment cannot depend upon any special quality in the ambassador or in M. *Joulin*, the real agreement being that, upon

the goods being delivered according to the contract, the payment shall be made out of that specific fund.

The main argument in the case has, however, been that the French government, though it has an undoubted interest in the fund, is not before the Court; and that even that the whole contract had been fulfilled to the day, the French government is still entitled to the balance which will remain, and is therefore entitled to see that the payments have been properly made. But it is clear, upon the authorities, that the plaintiff cannot compel them to come here and submit to the jurisdiction of this country. They may appear as has been done in other cases. The *United States* have filed bills in this country and have submitted to the jurisdiction, and thereupon have had their rights ascertained. But the question now raised is, whether, in the absence of the French government, it is possible to ascertain the rights to this particular fund, the French government declining to appear—a very proper course to take if they think fit.

Is there, then, to be a total failure of justice because the French *government declines to assert any right to the [565 fund? Messrs. *Morgan & Gooch* say reasonably enough that they knew nothing about the rights, and cannot undertake to determine them. They also say—not so reasonably—“let the fund remain until the French government comes in, or allow us to retransfer it, because the rights between these parties cannot be determined.” In answer to this, I will put the case of a foreign government having placed in this country a sum of money, and having charged it with certain trusts to be performed, subject to which the balance is to be paid back to the foreign government—Is it possible to say that in such a case the trustee is not liable to perform the trust because the foreign government, one of the *cestuis que trust*, cannot be made to appear? There is great analogy between this case and the case of an interpleader suit. In *Stevenson v. Anderson*, (¹), a banker having a fund claimed by several persons, all but one of whom were out of the jurisdiction, paid it into Court by way of interpleader, and then served all the parties out of the jurisdiction. In that case Lord *Eldon* said the fund could not remain here for ever, and that it would be paid out to the only person who did appear and submitted his claim.

In any such case we must ascertain as we best can, in the absence of the other parties, what are the rights of the parties who do appear. In the case of *Wylie v. Wylie* (²), in which a large sum of money was left by will to the Russian government, administration was taken out on behalf of the Russian govern-

(¹) 2 V. & B., 407.

(²) 6 Jur. (N.S.), 259; 29 L. J. (Ch.), 341.

ment, and litigation ensued; but there the Russian government appeared, and the difficulty did not arise. There may be many cases in which a foreign government has some interest, but the other parties interested must not suffer because it is impossible to compel the attendance of one of those who might claim the fund.

Messrs. *Morgan & Gooch*, however, say that they will be liable to the consequences of any proceeding that may be instituted in *France* by the French government, who might say that the fund was not to be handed over except upon the certificate of the ambassador. But I apprehend that the comity of nations would extend to such a case, and that the decision of this Court will be respected, as we should respect a decision of a Court in *France* 561] with reference to *any fund which was clearly within the jurisdiction of that Court, and which had to be dealt with upon facts which had taken place in that country. Moreover I apprehend that neither in that Court nor in any Court in any civilized country would it be held that where the certificate of a French ambassador is required a person would lose his money because, for instance, there happened to be no ambassador.

I stand, however, upon higher ground, for I assume that the Courts of all countries would recognize the decision of a Court of competent jurisdiction in a country where the property was situated, and where the rights were properly to be tried.

It appears to me, therefore, that there is no difficulty in the way of the plaintiff if the contract has been performed. As regards that part of the case, and as to the inquiry, I am very much of the same opinion as the Vice-Chancellor. I feel myself, however, bound to differ from him as to the effect of the evidence, as showing that the condition of time being of the essence of the contract has been altogether waived, and in that respect the decree must be varied.

MINUTES. — Declare that under the contract and letter, &c., the plaintiff became entitled to be paid rateably for all cartridges supplied to and received by the French government under the contract, &c., out of the sum of £40,000, &c.

Declare that the first limit of time, namely the 5th of December, 1870, was waived.

Inquire whether the second limit of time, namely, the 10th of January, 1871, was waived or extended, &c.

Inquire what number of cartridges were delivered or tendered by the plaintiff to the French government and at what dates, and whether any and which of them were received by the French government, and whether any and which were rejected, and whether or not having been tested by agents of the French government. Costs to be costs in the cause.

Adjourn further consideration. Liberty to apply.

Solicitors for the plaintiff: Messrs. *Innes & Son*.

Solicitors for Messrs. *Morgan & Gooch*: Mr. *Clements*.

May 28, 29; June 5, 1871. C. 233.

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*CRAMPTON V. VARNA RAILWAY COMPANY.

[562]

[Law Reports, 7 Chancery Appeals, 562.]

Corporation — Agreement not under Seal — Money demand — Part Performance — Building on the Land of another.

The agent of a railway company made a verbal agreement with the contractor for the line, that if he would build on land of the company certain cottages more substantially than would be required for his own purposes, and would leave them for the use of the company, then the company would pay him £5000. The cottages were accordingly built, and when the railway was completed the contractor left them on the land, and the agent of the company made an agreement with the contractor that he should be paid £500 a year for the cottages by way of rent with an option to the company to purchase them for £5000. This agreement was confirmed by a resolution of the board of directors. The company paid the £500 a year for some years, and then refused to pay :

Held, that the claim of the contractor being simply for payment of money could not be enforced in the Court of Chancery ; and that though the contractor was unable to sue at law because the agreement was not under seal, he did not thereby obtain an equity to enforce a claim for money :

Held, also, that inasmuch as the contractor did not act in ignorance of the rights of the company, he could not claim compensation for having been induced to build on the land of the company.

Order of the master of the rolls affirmed.

THE bill in this case was filed by *T. H. Crampton*, claiming under Messrs. *Peto, Betts & Crampton*, against the *Varna Railway Company*, and stated as follows : That the company was formed in the year 1863 for the purpose of making a railway in *Turkey*. That the company had always been a company carrying on business in *England*, and was a body corporate having a common seal. That the company was governed by certain statutes, which provided (amongst other things) that the seat of the company should be at *Varna* : that the affairs of the company should be managed by a council of administration in *London* : that the council should be invested with the fullest powers for the administration of the affairs of the company, and should enter into all agreements as to the purchase, sale, taking on lease, or letting any railway, lands, warehouses, or other building coming within the objects of the company, and should make agreements relating to *the interests or affairs of the company gene- [563 rally : that the company should have a common seal, and that all contracts and agreements purporting to be made by the company involving sums of more than £500 should have the common seal affixed thereto, together with the signatures of at least two members of the council and the secretary. That Messrs. *Peto & Co.* contracted for the construction of the railway by contracts under the seal of the company, one of the terms of which was that the company would at their own cost acquire all the land necessary for the railway and works, but that the contractors would at their own expense provide huts and dwellings for the

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workmen. That Mr. *McCandlish* (as engineer for the company) arranged with Mr. *Barkley* (as agent for the contractors) that, inasmuch as cottages were indispensable for the company for working the railway when opened, instead of the contractors setting up mere temporary huts for the use of their workmen during the construction of the works, they should build permanent and substantial cottages, which might, upon the completion of the railway, be retained and used as dwellings for the company's servants and officials. That *McCandlish* had full authority on the part of the company to enter into such arrangement, and that such arrangement was communicated to the directors, and they were fully aware thereof, and acquiesced in and approved of the same as being an arrangement very beneficial for the company. That, accordingly, substantial cottages and a house and stable were built by the contractors, under the superintendence and to the satisfaction of *McCandlish*, and with the acquiescence and approval of the directors, on land which had been acquired by the company for the purposes of the undertaking. That no definite sum was fixed as the price for such cottages, house, and stable, but there was an understanding during the time that the works were progressing that such price was to be £5000, which was, in fact, a fair price for the same. That *Barkley* wrote to *McCandlish* a letter stating that the cottages would not be handed over to the directors as part of the works, and that £550 would be a fair rent for them. That when the railway was nearly completed, some correspondence took place respecting the cottages, and on the 27th of October, 1866, *McCandlish* wrote to the directors a letter stating that he considered the rents at which the cottages might be rented from the contractors to amount to £500. That at a meeting of the directors on the 1st of November a resolution was passed that the recommendation contained in *McCandlish's* letter should be accepted, subject however to the company having the option of purchasing the cottages for the sum of £5000 on the general settlement with the contractors; and a copy of this resolution was sent by the secretary of the company to the agent of Messrs. *Peto & Co.* That the company agreed, instead of paying the £5000 for the cottages, to pay £500 a year, and the contractors agreed to this arrangement. That a letter was, on the 9th of May, 1867, written by the secretary of the company, under the order of the directors, to Messrs. *Peto & Co.*, stating that it had been arranged at Varna that the cottages should be rented by the company at £500 per annum. That in pursuance of this arrangement the cottages were not removed by the contractors, Messrs. *Peto & Co.*, and were left in possession of the company. That but for this arrangement they would have been

removed. That the right of Messrs. *Peto & Co.*, became vested in the plaintiff, who, in September, 1867, applied to the company pany for the rent. That the secretary of the company informed the plaintiff that it was inconvenient to pay cash, and the company gave their acceptance for £525, payable at three months. That this acceptance was from time to time renewed. That in January, 1869, the secretary of the company sent to the plaintiff a check for £500 on account of rent of the cottages, and on the 3d of March, 1870, the plaintiff received from the company £1072 in settlement of his claims for rent. What on the 15th of March, 1870, the secretary of the company wrote to the plaintiff stating that the company could no longer undertake the collection of his rents. That the company now allege that in consequence of a requisition from the Turkish government as to the accounts, they cannot recognize the plaintiff's claim to the yearly sum of £500 in respect of the cottages. That the company had agreed with Messrs. *Peto & Co.* that if they allowed the cottages to remain, the company would pay the yearly sum of £500 in respect of the cottages (determinable on payment by the company of the gross sum of £5000). That the plaintiff was advised that, inasmuch as the agreement with respect to the cottages was not under seal, and as the company claimed the legal estate in the *soil on which the cottages stood, he had no re- [565] medy except in this Court. And the bill prayed that the company might be decreed to perform specifically their agreement to pay the plaintiff the yearly sum of £500 in respect of the cottages until payment of the gross sum of £5000 in respect thereof, and that for this purpose the company might be decreed to execute all necessary instruments, and to pay to the plaintiff such damages as the Court might think fit; that an account might be taken of what was due to the plaintiff for arrears, or that the company might be ordered to pay damages in lieu of specific performance; and that the plaintiff might be declared to have a lien on all moneys belonging to the company which were remitted to *England*.

To this bill the company demurred, and the Master of the Rolls allowed the demurrer.

The plaintiff appealed.

Mr. *Southgate*, Q.C., and Mr. *Kingdon*, for the Appellant:

The ground on which this demurrer was allowed is, that the agreement with *Peto & Co.*, was not under the seal of the company; but in many cases that objection has not been allowed to impede the Court in doing justice: *Wilson v. West Hartlepool Railway Company* ⁽¹⁾; *Laird v. Birkenhead Railway Company* ⁽²⁾ *Orook v. Corporation of Seaford* ⁽³⁾.

(1) 2 D. J. & S. 475; 11 Jur. (N.S.), 124. (2) Joh., 500. (3) Law Rep., 6 Ch., 551.

The plaintiff has also an equity on the ground that the defendants encouraged *Peto & Co.*, to build on their land: *Earl of Oxford's Case* ⁽¹⁾; *Master, &c., of Clare Hall v. Harding* ⁽²⁾.

It is necessary to come into this Court on account of the want of a seal; but the plaintiff does not set up a mere money demand; he asks for specific performance and for rent to be paid: *Withy v. Cottle* ⁽³⁾. The company has had the benefit of the cottages, and cannot now turn round and defy the plaintiff.

Mr. Fry, Q.C., and Mr. Davey, for the defendants:

There is no specific allegation of what the plaintiff really conceives his claim to be. No doubt *Peto & Co.*, had a right to the 566] *materials, and all they have done has been to leave them on our land. The alleged contract did not vary the position of the parties. In all the cases cited there has been either acquiescence by the defendant or part performance by the plaintiff. What is the contract, and where is the evidence of it? The only equity alleged is that the contract is not under seal; but that alone does not give a right to come to this Court. If the contract had been under seal the plaintiff could not have come here, and would have been told to sue at law. What he asks, in fact, is simply payment of £5000, and that relief the Court of Equity does not decree. The Court has never assumed a jurisdiction merely because there was no seal to one of the instruments pleaded. The same argument was used in *Kirk v. Guardians of Bromley Union* ⁽⁴⁾. To give the plaintiff what he asks would be to prefer him to creditors under seal and according to the constitution of the company.

Mr. Kingdon, in reply:

We ask for rent. The company cannot be allowed to keep the cottages and pay no rent for them. It is not true that *Peto & Co.*, merely left the materials; they built much better houses than they wanted for their own purposes, and they did this on the faith of this agreement, which the company now deny. Neither the company nor its creditors can be allowed to keep our cottages and pay us nothing for them.

June 5. LORD HATHERLEY, L.C., after stating the facts of the case, continued:

Undoubtedly this case is of a very peculiar character, and in some respects almost of first impression.

It is not alleged by the plaintiff that there was any formal written agreement between the parties, but it is alleged that the agreement is to be found in letters written by the agents, and in resolutions of the directors. We must, therefore, take it upon

⁽¹⁾ 2 Wh. & T. L. C., 548, 562.

⁽²⁾ 1 S. & S., 174.

⁽³⁾ 6 Hare. 273

⁽⁴⁾ 2 Ph. 640; 12 Jur., 85.

the allegations in the bill, that a person who was duly authorized by the company to enter into an engagement did enter into an *engagement that if the plaintiff would build substantial [567 cottages instead of huts, and would leave those cottages standing, then the company would pay the plaintiff £500 a year, or in lieu of that £5000.

The plaintiff, no doubt, is in a position of considerable difficulty, because one of the provisions under which the company was founded is that all contracts and engagements must be entered into under seal. The plaintiff, however, avers that the secretary was duly authorized to enter into this agreement, and further, that communications by letter took place between him and the secretary, and that the company did pay the £500 a year. This the plaintiff says is evidence of the contract, and he says that it was performed by erecting substantial cottages and leaving them there, and that the company had recognized the contract by paying the £500 a year. It appears, however, that both sides have found it difficult to shape their respective demands, and after a time the company chose to treat themselves as agents for the plaintiff to receive the rents of the cottages and pay them to the plaintiff up to the extent of £500. This, upon the statements of the bill, they had no right to do, and the plaintiff accordingly requires the company to pay the £500 a year whether the cottages are let or not.

This agreement is very peculiar. It is not averred that the cottages being built on the land of the company, they agreed to demise them to the plaintiff, and then to take by sub demise from him, as might, I presume, be done in *Turkey*; but the agreement averred is an agreement to build houses on land of the company, and to be paid so much for so building.

Now that is a money contract not enforceable in this Court. Nor can the plaintiff call to his aid *Lord Cairns' Act* (21 & 22 Vict. c. 27), because it has been settled conclusively that the Court will not give damages under that Act unless it has original jurisdiction for specific performance. If the Court has jurisdiction for specific performance, but performance would be inconvenient, then the Court would be enabled to exercise an option, and to give damages, but not otherwise.

In this state of things, another view of the case was very ably and ingeniously suggested by Mr. *Southgate* and Mr. *Kingdon*.

They argued that the case came within the doctrine laid down by *another class of cases such as *East India Company v. Vincent* (1), where a landowner allows another man to spend money upon the land in the belief that he will have the profit. This Court holds such conduct to amount to a contract by the

(1) 2 Atk., 83,

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Crampton v. Varna Railway Co.

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landowner that the person who spends the money shall have possession of that on which the money is spent, and the enjoyment of the property he has so created.

That class of cases is numerous, and in some of them the difficulties with regard to corporations have been got over, and it has not been allowed to a corporation, any more than to an individual, to take the benefit of any misapprehension into which the other person has been led, and on the faith of which misapprehension the other person has expended money on the land.

But that class of cases has no application to a case like this. They are all founded on the ignorance of the person who has been allowed to proceed as if he were himself the owner, and the Court has only in such cases assumed the existence of an engagement that the person who has been allowed to build shall have the rights which he supposed himself to have. Here, however, the contractors knew that the land was not theirs, and that what the company were to do was to pay £5000 for the cottages which the contractors were building.

I understand that the Master of the Rolls did not refer to the other branches of the argument, and said shortly that the case was reduced to a money contract. I believe he was right; and that this being a money contract, and not a proper subject for specific performance, the Court cannot give relief by way of damages. In the case of *Kirk v. Guardians of Bromley Union* ⁽¹⁾, although bad faith on the part of the defendants was alleged, it was held that there was no contract on which an action could be brought at common law; and that therefore a bill could not be filed in order both to constitute and to enforce the alleged contract.

The truth is, that every one who deals with corporations like these must be taken to know what are their powers of contracting, and must take a contract accordingly; and when there is only a money demand, and there is no valid contract, then this Court cannot interfere in the matter.

569] *I certainly was impressed with the consideration of the length to which these doctrines might be carried; but I think that the arm of the Court is always strong enough to deal properly with such cases. There might be a contract without seal under which the whole railway was made, and of which the company would reap the profit; and yet it might be said that they were not liable to pay for the making of the line. When any such case comes to be considered, I think there will be two ways of meeting it. It may be (and perhaps is so in this case) that the contractor has his remedy against the individual with whom he entered into the contract, although he may have no remedy

⁽¹⁾ 2 Ph., 640; 12 Jur., 85.

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against the company; or it may be that the Court, acting on well recognised principles, will say that the company shall not in such a case be allowed to raise any difficulty as to payment. But the matter in question here is collateral to the main object of the company, and is not essential to the existence of the railway for which the company was incorporated; and in that respect this case differs from the case I have supposed, and does not call for the interference of the Court.

I think the position of the plaintiff is very unfortunate; but subject to what remedy he may have at law against the persons who entered into the engagement with him, it appears to me that he is left without remedy.

I must dismiss the appeal; and it being a case in with the law is settled, I am obliged to dismiss it with costs.

Solicitors for the Plaintiff: Messrs *Baker, Folder, & Upperton*.
Solicitor for the Defendants: Mr. *H. P. Sharp*.

L. JJ.

April 16, 23, 25, 29; May 6. 1869 M. 80.

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*MURRAY V. CLAYTON.

[570]

[Law Reports, 7 Chancery Appeals, 570.]

Patent — Anticipation — Combination — Specification — Useless Machine.

Where a machine for which a patent had been granted was shown to produce work more expeditiously, more economically, and of a better quality than any previous machine:

Held (reversing the decision of *Bacon*, V.C.), that the patent could not be invalidated on the ground that the machine was formed by the mere arrangement of common elementary mechanical materials, producing results of the same nature as those previously accomplished by other mechanical arrangements and construction.

The public exhibition of a machine in which there are defects, owing to which it proves an entire failure, does not affect the validity of a subsequent patent for a machine, in which, though similar in some of its details to the former, the defects are remedied so as to produce a serviceable machine.

Forwell v. Bostock (1) considered.

THIS was an appeal by the plaintiff from a decree of Vice-Chancellor *Bacon* dismissing his bill, which was filed to restrain the infringement of a patent.

In the specification filed on the 8th of December, 1866, the invention was thus described: "This invention of improvements in machinery for making bricks relates more particularly to the mechanical appliances for cutting the clay (as it passes out of the exit aperture of the kneading or brickmaking machine) into bricks of the desired shape and dimensions. To this end, supposing a quantity of clay of the proper sectional area and sufficient length to form say twelve bricks has been expressed from the kneading machine and delivered on to the table of the

(1) 12 W. R., 723.

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machine about to be described, the proper length to form from eight to twelve bricks is first cut off by means of a vertical wire or wires mounted in a reciprocating frame which is capable of moving to and fro on guides affixed to the side standards or other suitable part of the machine. The proper length of clay having been thus cut off, the lump is next pushed forward against a series of fixed wires, whereby it is divided up into bricks of the usual and proper dimensions. This pushing forward of the lump of clay is effected by means of a *second moveable frame or table, to which is adapted a series of separate blocks or pistons, which as they advance, push forward the clay against and past the fixed wires. This advance of the clay is effected by means of a hand lever, or by means of a rack and pinion motion, which is acted upon by a winch handle or a hand wheel. If desired, the vertical wires against which the clay is pressed in order to divide it into bricks may have a slight upward motion given to them, so that the operation of dividing the clay may be effected by means of a kind of drawing cut." The specification then, after describing the machine by reference to drawings, concluded as follows: Having now described my invention of 'improvements in machinery for making bricks,' and having explained the manner of carrying the same into effect, I claim as the invention secured to me by letters patent the arrangement and construction of parts herein set forth for cutting clay into bricks. I claim particularly cutting the clay into the form of bricks, by forcing the clay forwards, by means of a pushing board or otherwise, against a series of fixed wires so arranged that the clay is pushed or forced past the wires on to a moveable board provided with handles, so that twelve or any other convenient number of bricks may be removed at the same time."

By the 8th paragraph of his bill, the plaintiff alleged that in January, 1869, he discovered that the defendants had made and sold a machine which contained all the special improvements in the plaintiff's machine, and was a fraudulent imitation of it. He alleged that in the defendants' machine, supposing a quantity of clay of the proper sectional area and of the proper length to make say twelve bricks had been expressed from the kneading machine, it was delivered on to a table of the same character, and in the same manner as shown in the plaintiff's specification; that in the defendants' machine the proper length to form from eight to twelve bricks, was first cut off by means of a wire mounted on a guide affixed to a bottom centre, the only difference being that the wire acted radially and not vertically, which was only a colorable difference, and that in the defendants' machine, the proper length of clay having been cut off by the

radial wire, the lump was pushed forward so as to be opposite to a series of fixed wires which were fastened to a moveable frame, in which respect there was *colorable difference [572 between the two machines, as the cutting of the lump in the defendants' machine was effected by the passage of the wires through it, whereas in the plaintiff's machine the lump of clay was driven by a moveable pushing board through the wires; in which particular the defendant's contrivance was not an improvement on the plaintiff's invention.

The defendants admitted by their answer the points of similarity alleged by the 8th paragraph of the bill, but alleged that the plaintiff, by his specification, did not make any claim to the effecting those operations by machinery, and that they had been performed by brickmaking machines which were in use before the plaintiff's patent. They admitted the utility of the invention to which the plaintiff laid claim, but denied that he was the first or true inventor, and alleged that it was known and used in the country before his patent.

One of the two inventions which were chiefly relied upon by the defendants as invalidating the plaintiff's patent for want of novelty was a machine patented by *Dahlke* in 1863. *Dahlke*, by his provisional specification, said: "This invention consists in mounting upon a frame, with wheels for traveling on rails or trams, a set of rollers covered by an endless belt, which belt receives the clay as it is expressed from a moulding machine. At a further end of the rollers other rollers are fixed, and over them a frame capable of traverse motion. Between the endless belt and traverse frame a cutting wire or blade is placed, and the far end of the traverse frame is provided with a door, which usually remains closed, but which may be opened when required. The endless belt rollers and the traverse frame are all connected to the wheeled frame, and capable of being moved to and fro. On the clay being fed from the moulding machine, it travels along the endless belt, and its outer ends abut against the door before mentioned. The cutter is then brought into action, and severs the clay between the endless belt and that contained in the traverse frame. Then the traverse frame is pulled out laterally, whereby the clay is brought into contact with say three cutting wires or blades, and the three portions of clay so cut, are removed, ready for being stacked." It appeared that this invention had been found practically unserviceable, and it never came into use.

*The other invention relied upon was a machine stated [573 to have been by the defendants, and exhibited at their works in 1864. One of the defendants, being in *Germany* in 1863, brought home with him a description of a machine invented by

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Sachsenberg, which was similar to *Dahlke's* machine. The defendants stated that, towards the latter end of 1864, they made a working model of this machine, with this variation, that they substituted a plane table for the rollers and that this machine was shown at their works to a great number of engineers and brickmakers. It did not appear, however, that it was considered by them to be practically useful, and a witness, who had been employed to exhibit, deposed that it was very laborious to work it, and that if it had been adapted to cut six bricks, the labor would have been so great that one man could not have worked it at all.

In 1866 Mr. *Dixsee*, then a partner in the defendants' firm, took out a patent for a machine for cutting bricks, but it contained no moveable board for receiving the bricks, and was in other respects so materially different from that of the plaintiff, that it was not suggested that it was an anticipation of it.

Vice-Chancellor *Bacon* having dismissed the bill with costs (*), the plaintiff appealed.

(*) 1872. Jan. 18.

SIR JAMES BACON, V.C.:

Many authorities have been referred to, and the decisions of Judges of the greatest eminence, in cases of the utmost interest, have been quoted. It is needless for me to say that I listen to and consider those authorities with unbounded respect and deference. The principles of the law applicable to the subjects with which they deal are, however, much older than any of those cases. Highly valuable as the cases are, inasmuch as they contain unqualified recognition of well established principles, their great interest consists rather in the admiration which is excited by the clear, nervous, forcible manner in which the terms of the law are expressed — by the dialectic skill which is displayed — in many of such judgments, than in any addition which those judgments contribute to the previously existing law on the subjects to which they relate. Possessing those characteristics, it is not surprising that they are referred to and quoted whenever occasion requires. But I am satisfied that none of the Judges who have been mentioned in the course of the argument imagined they were laying down any new law, or doing more than state in their own forcible style the rules and axioms of that law which they knew to exist, and the application of that law to the particular cases then before them.

The law upon the subject of patents is clear and simple. Long before the *Statute of Monopolies*, it was decided at common law that the royal prerogative authorized the grant of a patent or monopoly to any man "who, by his own wit and invention, did bring any new trade into the realm, or any engine tending to the furtherance of a trade that was never used before." — *Noy's Reports*, p 182.

In the 21st year of the reign of James I, an Act (21 Jas. I, s. 6) was passed, which is commonly called the *Statute of Monopolies*, of which the 6th section protects letters patent for "the sole working of new manufactures, to the true and first inventors of such manufactures, which others, at the time of making such letters patent, shall not use." And this statute has been always held and rightly considered not to introduce a new law, but to be declaratory of the common law, and simply to exempt patents which were good at common law from the penalty which the statute imposes upon such patents as were thereby prohibited (3 Co. Inst. c. 85, pp. 181, 184).

Numerous as have been the cases which have since been decided on the subject of patents, the law thus established has never been in any degree departed from or lost sight of.

The reasons and principle of the law are as obvious as its expression is distinct and plain.

*Mr. Webster, Q.C., Mr. Higgins, Q.C., and Mr. R. Melville, for the appellant.

Mr. Fooks, Q.C., and Mr. Aston, Q.C., for the defendants.

A petitioner for a patent alleges to the crown that he has made a new and useful discovery. As a just reward for such discovery, assuming the allegation to be true the crown grants him the exclusive use of his invention. If the allegation turns out to be untrue, the grant becomes void. The validity of the patent in this and in all other cases must depend upon the fact whether the alleged invention is or is not new, and upon the establishment of that fact this case must be determined.

Now, in endeavoring to determine the question of fact thus raised, I must observe that it is obviously impossible to reconcile the conflicting statements of the witnesses respecting the *Sachsenberg* machine, said, on the plaintiff's behalf, to have been made at the end of 1866 and the early part of 1867, and by the defendants' witnesses to have been made in 1864 and 1865. It has occurred to me as possible that the workmen—*Newland*, the *Westcott's* and others—may be mistaken in the date which they assign to the operations in which they were engaged; and as it has been proved that a machine of the like kind was made at the works in October, 1866, and sold, and sent to *America*, that all that they have said on the subject may be true with respect to that machine. But although I am unwilling to suppose that any of these witnesses have been guilty of wilful misstatements, it would be unsafe to rest my opinion on any speculative mode of reconciling their statements with the facts proved. Having, however, carefully considered the printed depositions, and having had the still more satisfactory opportunity of observing the manner in which the witnesses orally examined have given their testimony, and being compelled to form a conclusion as to the matters of fact which are involved—and in this respect to discharge the function of a jury—I must say that it is proved to my satisfaction that the statements of the defendants *Clayton* and *Burdett*, and their witnesses *Bodman*, *Bell*, *Peter*, *Clayton*, and *Hardman*, as to the time when, and the circumstances under which, the *Sachsenberg* machine was constructed and publicly used, and as to the manu-

facture and sale of a similar machine in 1866, corroborated as they are by the production of the original drawings made by *Bartlett*—the working drawings made by *Bodman* and executed by *Bell*—the entries in *Dirsee's* books and the invoice in *Clayton's* handwriting, and the memorandum of the shipment to *America* by *Peter Clayton*—are to be relied on in preference to those of the plaintiff's witnesses; and I cannot therefore hesitate to find, as a fact, that this *Sachsenberg* machine was made and used before the date of the plaintiff's patent. Nor can I hesitate to believe that Mr. *Andrew Murray* is mistaken in the conclusion which he draws from his inspection of the machine on two occasions he mentions after the sale had commenced, or doubt that no more was done to the machine on those occasions than that which is described by *Bodman*, and is of no substantial importance. The plaintiff's charge, therefore, that the defendants fraudulently caused the machine to be altered, in my opinion wholly fails proof.

Now, turning to the plaintiff's specification, let us see what it asserts and describes. It asserts the plaintiff to be the inventor of improvements in machinery for making bricks, and that such invention relates more particularly to the mechanical appliances for cutting the clay as it passes, into bricks of the desired shape and dimensions. Neither here nor in any other part of the specification is any mention made of any previously existing machinery for making bricks. It may mean some or all of such machinery, and neither here nor elsewhere does the plaintiff state the nature of any particular improvement made by him. It goes on to describe the effect and operation of the improvements: "A sufficient quantity of clay being expressed from the kneading machine, and delivered on to the table to be described, the proper length to form from eight to twelve bricks is first cut off by means of a vertical wire." In *Sachsenberg's* machine, "to separate the stream of clay a piece is cut off by means of a fine steel wire." In *Dahlke's* specification, "between the endless belt and transverse frame a cutting wire is placed, which severs the clay between

575] *Mr. Webster, in reply.

The following cases were referred to: *Jones v. Pearce* ⁽¹⁾; *Crane v. Price* ⁽²⁾; *Huddart v. Grimshaw* ⁽³⁾; *Daw v. Eley* ⁽⁴⁾; *Lister v. Leather* ⁽⁵⁾; *Cannington v. Nuttall* ⁽⁶⁾; *Hill v. Evans* ⁽⁷⁾; *Nelson v. 576]* **Betts* ⁽⁸⁾; *Parkes v. Stevens* ⁽⁹⁾; *Brook v. Aston* ⁽¹⁰⁾; *Carpenter v. Smith* ⁽¹¹⁾; *Stead v. Williams* ⁽¹²⁾; *Househill Coal and Iron Company v. Neilson* ⁽¹³⁾; *Foxwell v. Bostock* ⁽¹⁴⁾.

the endless belt and that contained in the transverse frame." The plaintiff says, "The proper length of clay being thus (*i. e.* by means of the vertical wire) cut off, the lump is next pushed forward against a series of fixed wires, whereby it is divided into bricks." In *Sachsenberg's* description, "the length of the piece of severed clay, forming the thickness of three bricks, is now on a second horizontal sliding frame, which is pushed or pulled quickly through on the carriage between two fixed parallel steel wires, which causes the cutting of the piece of clay into three separate bricks ready then to be taken into the shed for drying." In *Dahlke*, after the mass of clay has been severed, "the transverse frame is pulled out laterally, whereby the clay is brought into contact with say three cutting wires or blades, and the three portions of clay so cut, say bricks, are removed ready for stacking." In *Branham's* specification the "clay is divided by wires into the size of bricks, and by the aid of the boards conveyed into the drying room." In *Cookson* and *Homers*, the plastic material is forced "through dies of the requisite shape on to tables where it is cut into pieces of proper length by wires mounted in a traversing frame." In *Dixsee's* the cutting wires are fixed in a frame, "and when the frame is moved from one side to the other the wires pass through the clay."

So far, therefore, the means employed in the several inventions are substantially the same, and the result is exactly the same. But in the description of the plaintiff's drawings which form a part of his specification, he mentions a pushing board which he says is "moved forward, and pours the lump of clay

past the fixed wires on to a board placed at the part indicated of the table. The clay will thus be left in the form of bricks, and the lot may be removed at once by lifting up the board on which they are placed." Much was said in the course of the argument as to this particular, and it was said that this operation, by avoiding the risk of spoiling the bricks by handling, would support the patent. It is however clear that, in the other patents, whether the clay be pushed against the wires or the wires forced through the bricks, the result is the same; there must, of necessity, be in each case something to uphold the bricks; it is not necessary that they should in any case be removed by hand; and *Dixsee's* invention is distinctly stated to provide lateral supports for the bricks, so that "the cutting wires are prevented from breaking the bricks or pressing them out of shape."

I do not stop to notice the statement of Mr. Bramwell that the alteration of the arm by which the push board is made to cut, has been altered in the plaintiff's model, No. 4, so as to be materially different from that described in the specification; nor is it necessary advert to the plaintiff's claim for "a moveable board provided with handles," since it has been abundantly proved that moveable boards for the same purpose are an old and well known contrivance; and, indeed, the claim is, as I have said, given up as a substantive thing although the plaintiff still claims it as a part of his invention. But, having examined and considered with the utmost attention the plaintiff's and the other specifications and drawings, I am unable to discover a trace of novelty

⁽¹⁾ 1 Webs. Pat. Cas., 122.

⁽²⁾ *Ibid.*, 393.

⁽³⁾ *Ibid.*, 85.

⁽⁴⁾ Law Rep., 3 Eq., 496.

⁽⁵⁾ 8 E. & B., 1004.

⁽⁶⁾ Law Rep., 5 H. L., 205.

⁽⁷⁾ 4 D. F. & J., 288.

⁽⁸⁾ Law Rep., 5 H. L., 1.

⁽⁹⁾ Law Rep., 8 Eq., 358; *Ib.*, 5 Ch., 36.

⁽¹⁰⁾ 8 E. & B., 478.

⁽¹¹⁾ 9 M. & W., 300.

⁽¹²⁾ 7 Man. & G., 818.

⁽¹³⁾ 9 Cl. & F., 788.

⁽¹⁴⁾ 12 W. R., 723.

*May 20. SIR W. M. JAMES, L.J., after stating the [577 nature of the suit, and giving a summary of the evidence that the plaintiff's machine was novel and usef], continued:

There being, then, this proof of the utility and of the *de facto* *novelty of the plaintiff's invention, it is necessary to con- [578 sider whether that novelty is *de jure* as well as *de facto*, that is to say, whether there has been any such anticipation of the invention, either by any former patent or by any former user of any of any other machine as to invalidate his right to the protection of the patent law. Now it will be convenient, before considering that, to see what is the true construction of the plaintiff's specification, and what it is that he has claimed by it. [His Lordships here read the material parts of the specification, as given above.]

Now I am of opinion that the plain meaning of that specification is that the plaintiff claims the machine, that he claims the combination as the means of enabling him to produce this result, namely, that the workman can by one turn of the wrist at once cut a mass of clay into twelve or more bricks, put upon a board so that they may be removed from there to the drying place without ever being touched by the hand of the operator. The claim is not to any particular part; it is not a claim to the wire for cutting, because everybody knows that wire will cut a plastic substance; nor to the forcing the plastic substance

in the machinery, or in the means of applying it, or in the results produced by its employment. That the plaintiff's machine is capable of producing from eight to twelve bricks at one operation cannot be of importance, since by increasing the size of the frame or table (and the word seems to be convertible) and by adding to the number of cutting wires, the number of bricks produced may be just such as the manufacturer thinks fit.

But then it has been argued very strenuously on the part of the plaintiff and indeed the argument in reply was chiefly directed to this point—that, notwithstanding all the facts proved, the plaintiff's invention, consisting of a combination of mechanical principles and agents not in themselves new, but consisting of “the arrangement and construction of the parts described” in the specification and drawings, such arrangement and construction so claimed by him would support his patent; and in support of this argument great stress was laid upon the facts proved by the plaintiff's witnesses—that the bricks made by his machine were worth 2s.

per thousand more than any others and that it could produce from 3000 to 5000 more bricks *per diem* than any other machine with which the witnesses were acquainted; and there were many of such witnesses, well acquainted with brick making and with the machines employed in that manufacture, who spoke of the plaintiff's machine in terms of unqualified commendation, and said that, according to their knowledge, it was a novelty, and an improvement upon all the brick-making machines with which they were acquainted. But, assuming all this to be true, I do not think it can therefore be held that the plaintiff is entitled to the monopoly which the patent purports to grant. No doubt a combination of things not in themselves new, but which combination is perfectly new in the form in which the inventor has cast it, and producing new and more beneficial results, may be the subject of a patent: *Huddart v. Grimshaw* (*Webster's Patent Cases*, 85). But I am aware of no case in which it has been held that the mere arrangement of common elementary

against the wire, because everybody knows that whether you move the substance or move the cutting instrument you produce a division in that way. It is not a claim for the table, any more than for the legs of the table, or anything else that forms a part 5791 of the machine. It is a claim for *the entire machine, produced by the arrangement and construction of the parts thereinbefore set forth.

That, then, being the claim, let us see whether it has been in any manner anticipated. The only things upon which any great stress has been laid before us are *Dahlke's* patent, and the machine called the "German machine," being in truth another form of *Dahlke's* machine, which is said to have been in use at the works of the defendants, partly during the time of his partner, who was an intermediate owner before he resumed his possession of it.

[His Lordships then read the material parts of *Dahlke's* specification, which described a complicated apparatus, from which the bricks, after having been cut, were taken away by hand, and claimed the combination as the subject of the patent.]

It is quite clear to my mind that the invention of *Dahlke's* is a thing so substantially different in its principle, and all its details, from that of the plaintiff, that if it were made to-day for the first time it could not be considered as an infringement of the plaintiff's patent. The only similarity that I can find in

mechanical materials, and the construction by means of such arrangement of a machine which produces no other result than that which had been previously accomplished by other mechanical arrangements and construction, would support a patent. If it were so, there would be no protection to the public or to earlier patents against the ingenuity of any artisan who might have the skill to arrange the old mechanism in a new shape, and thereby to appropriate to himself the fruits of previous inventors in the proper sense of that term, so that the privilege and reward which the law only concedes to art and wit and invention might be bestowed upon mere skill in handicraft.

If, however, there were in this instance any such novelty in the arrangement adopted by the plaintiff as would give to what is called his invention the character of an art, it is neither shown by the evidence, nor is it stated in terms in the specification, which contains no mention of or reference to any previous machines or mode of operating upon which it is assumed, under the vague generality of the title and claim,

that the plaintiff's invention is an improvement. The law applicable to this subject is stated in most clear terms by Lord Westbury in his judgment in *Foxwell v. Bostock* (12 W. R., 723). It was said, indeed, that the question there decided related to an extremely complicated machine, and no doubt that was so; but the decision was upon a principle of law, which must be the same to whatever subject it may be applied.

[His Honor read a passage from Lord Westbury's judgment, and continued:]

With this very clear exposition of the law, founded as it is upon the authority of many decided cases, I am bound to hold, as I do, that the plaintiff's specification is insufficient in the respect I have last mentioned. And upon this ground — but not upon this ground alone — I am of opinion, having regard to the pleadings and to the evidence in this cause, that, for the reasons I have endeavored to express, the plaintiff's suit fails, and his bill must be dismissed.

them is that in each there is a division by a cutting wire of a lump of clay into bricks, and that that division is effected by means of the pressure of the clay against the cutting wire. As I said before, it appears to me a matter of common knowledge that clay can be cut by a wire, and that it is a mere matter of arrangement whether you cut it by means of pressing it against the wire, or letting the wire press through the material itself. This patent of *Dahlke's*, after having had a fruitless existence for three years as we are told at the bar, was suffered to expire before the plaintiff's patent was taken out.

Now we come to deal with the machine which the defendants say was used in their works. With regard to that, there was in the Court below a great mass of contradictory and utterly irreconcilable evidence; and it was quite clear that the witnesses on one side or the other were not speaking the truth. The Vice-Chancellor came to the conclusion that the weight of evidence was in favor of the defendants and their witnesses as to the time at which this machine was made and used at the defendants' works. The plaintiff's counsel before us he has thought it best not to invite us to *reconsider that matter, and has in fact [580 said that, according to his view of the case, it is wholly immaterial, and that, in some aspects of the case, the defendants' account of that machine is strong evidence indeed in support of the plaintiff's case. One of the defendants says that he, or a person representing him, was in *Germany* in the year 1863 or 1864, and there saw the *Suchsenberg* machine, or a description of it, and he thought it worth while to bring home with him the German description of it, which he has produced in evidence. This machine is, in fact, the same as *Dahlke's*; and the defendant says that, from the description which he brought home, a machine was made at the latter end of the year 1864, but made with this variation, that finding the rollers cumbersome and useless, he substituted for them a table, which, he says, answered the same purpose as the plane table surface in the plaintiff's patent. He says that the defendants made that machine, and that it was exhibited at work to a great number of engineers and brickmakers. It does not appear, however, that the machine itself was a machine actually made for sale. It was, no doubt, a working specimen — not the thing itself, which he wanted to sell, but a working specimen, for which he was ready, as a maker, to take orders. Now, of all those machine makers and engineers and brickmakers whom he represents as having seen the thing tried and in work, not one has been called to prove that he thought the machine of the slightest utility. One witness only there is who says that he was in the habit of going with people to show them the defendants' machines, and, amongst others, they in-

spected in his presence this German machine ; but none of them would buy it, because the common table cost £4, and the German machine would cost £15. That seems very nearly conclusive as to its being of no use ; for if it had substantially saved any labor in the process of brickmaking, such a difference of price would be a matter of no importance whatever. There is no doubt that a brickmaker in much work would spend £11 or £15 over and over again in order to get a machine which would give him the slightest probability of effecting any economy in his work. No machine of this description was ever bought ; and upon a change of partnership upon Mr. Clayton retiring, leaving his partner, Mr. Dixsee, in possession, this machine and 581] another were valued together by the *outgoing and incoming partners as worth £3, which, probably, was hardly the value of the materials. Then, on the other side, there is the evidence of *Newland*, who says that it was an entire failure ; that it was utterly useless for all practical purposes whatever ; that when he was working it for the purpose of showing it, he could not work at it for more than a quarter of an hour or twenty minutes at a time on account of the labor being so great, and that, in his opinion, if it were arranged so as to make six bricks at once instead of the three which it did make, it would be utterly impossible for a man to work it at all. Other witnesses gave evidence to the same effect. This evidence fully explains why the thing was an absolute and entire failure, because the merit of every invention of this kind is that it saves labor. If, then, a machine requires more labor to work it than would be required to do the same work by hand, that machine is, as described by the witnesses, a perfectly useless and abortive attempt at improvement. On the other hand, there is the evidence of Mr. *Bramwell* (and perhaps there may be some other witnesses who speak to the same effect) that he has seen the machine at work, and that it is "a perfectly efficient machine." We have seen it worked here in the Court, and no doubt in one sense it is an efficient machine ; it does cut off the three bricks, but that is all that it does. There is nothing whatever to countervail the evidence that it is practically quite useless. Now, I am not aware of any principle or authority upon which the exhibition of a useless machine which turns out a failure can be held to affect the right of a patentee who has made a successful machine, although there may be a degree of similarity between some of the details of the two machines. This question is not wholly untouched by authority. In *Jones v. Pearce* (1) a patentee had patented a particular wheel. The evidence showed that a wheel constructed on the same principle had been used by Mr.

(1) 1 Webs. Pat. Cas., 122.

Strutt at his works near *Derby*, first on the road for a long time, and afterwards for conveying articles of farm produce from his farm to the works; but after it had been used for some years it had been put aside, and when worn out it was never replaced. This had taken place some years before the plaintiff had taken out his patent. There had been the public use of these wheels upon *the roads, and Mr. Justice *Patteson* left the case to [582 the jury in these terms: "If, on the whole of this evidence, either on the one side or the other, it appeared that this wheel, constructed by Mr. *Strutt's* order in 1814, was a wheel on the same principles, and in substance the same wheel as the other for which the plaintiff has taken out his patent, and that it was used openly in public so that everybody might see it, and he had continued to use the same thing up to the time of taking out the patent, undoubtedly then that would be a ground to say that the plaintiff's invention is not new, and if it is not new of course his patent is bad, and he cannot recover in this action. But if, on the other hand, you are of opinion that Mr. *Strutt's* was an experiment, and that he found it did not answer, and ceased to use it altogether, and abandoned it as useless, and nobody else followed it up, and that the plaintiff's invention which came afterwards was his own invention, and remedied the defects, if I may so say, although he knew nothing of Mr. *Strutt's* wheel he remedied the defects of Mr. *Strutt's* wheel, then there is no reason for saying the plaintiff's patent is not good." Therefore, if there were defects in the German machine which made it useless, and the plaintiff afterwards made a machine in which those defects were remedied so as to make it a good machine instead of an abortive one, he would be entitled to maintain his patent.

But the case does not stop there. The defendants appear to have been the only persons in *England* who knew of the German machine. It had attracted their attention so much that they brought over the description of it to this country; they made one of these machines, improved it, and tried it, and having their minds applied to the obtaining the same object or a similar object, they never think of making a table at all like that of the plaintiff. Instead of that, they make a machine apparently of considerable merit, which is known as *Dixsee's* machine. This machine, the patent of which is before us, is substantially and materially different in all respects from the plaintiff's machine, and it has not been suggested to us that it is an anticipation of the plaintiff's machine. Of course if it were the parties would be reversed, because *Dixsee's* patent is still in force, and the owner of it would be filing his bill against the plaintiff.

[*His Lordship then considered the evidence given by [583

Mr. *Bernays*, an assistant civil engineer at *Chatham Dockyard*, as to a trial by the admiralty of several brickmaking machines in 1865, in which the defendants were among the competitors, and continued:]

This evidence shows that the defendants, when competing for government work, with all the knowledge they possessed from this previous user, which is said to be an anticipation of the plaintiff's patent, never thought of anything in any way like the machine which the plaintiff invented; and it is scarcely possible to get stronger evidence of the entire novelty of the plaintiff's machine. The machine, too, when produced, is so simple and so completely adapted to effect its object, that one feels disposed to wonder how people could have gone on for thousands of years making bricks without ever having thought of it; but that is the case with many noted inventions — when the thing is once hit it seems a marvel that it was not hit before.

Before proceeding to consider the last question, that of infringement, it is necessary to refer to the Vice-Chancellor's judgment. His Honor, after referring to the evidence of the witnesses who spoke of the plaintiff's machine in terms of unqualified commendation, and said that, according to their knowledge, it was a novelty and an improvement upon all the brickmaking machines with which they were acquainted, says: "But, assuming all this to be true, I do not think that it can therefore be held that the plaintiff is entitled to the monopoly which the patent purports to grant. No doubt a combination of things, not, in themselves new but which combination is perfectly new in the form in which the inventor has cast it; and producing new and more beneficial results, may be the subject of a patent; but I am aware of no case in which it has been held that the mere arrangement of common elementary mechanical materials, and the construction, by means of such arrangement, of a machine which produces no other results than that which had been previously accomplished by other mechanical arrangements and construction, would support a patent. If it were so, there would be no protection to the public or to earlier patents against the ingenuity of any artisan who might have the skill to arrange the old mechanism in a new shape, and 584] thereby to *appropriate to himself the fruits of previous inventors, in the proper sense of that term, and so that the privileges and reward which the law only concedes to art, and wit, and invention, might be bestowed upon mere skill in handicraft."

I find it very difficult to reconcile this proposition with what has been said by many judges in many cases, and more particularly in the case of *Crane v. Price* ⁽¹⁾. Now, no doubt *Crane v.*

⁽¹⁾ 1 Webs. Pat. Cas., 393.

Price has been questioned, and if I may be permitted to say so, with all respect to the very powerful tribunal which decided that case, I have never been satisfied with the decision. That, however, was simply because I could not see how the word "combination" could be properly applied to the introduction of a particular kind of fuel into a machine which had been patented for the use of every kind of fuel in the making of iron; and neither I nor, so far as I am aware, any other judge has ever questioned the principles upon which that case was decided, and which are thus laid down in the judgment of the court delivered by Chief Justice *Tindale* (1): "We are of opinion that if the result produced by such a combination is either a new article, or a better article, or a cheaper article to the public, than that produced before by the old method, that such combination is an invention or manufacture intended by the statute, and may well become the subject of a patent. Such an assumed state of facts falls clearly within the principle exemplified by *Abbott*, C.J., where he is determining what is or what is not the subject of a patent, namely, it may, perhaps, extend to a new process to be carried on by known implements or elements acting upon known substances, and ultimately producing some other known substance, but producing it in a cheaper or more expeditious manner, or of a better or more useful kind. And it falls also within the doctrine laid down by Lord *Eldon*, that there may be a valid patent for a new combination of materials previously in use for the same purpose, or even for a new method of applying such materials. But the specification must clearly express that it is in respect of such new combination or application."

That being so, I cannot concur with the Vice-Chancellor in saying that the patent of the plaintiff was to be invalidated upon the principle which he has laid down, because, if the evidence *is to be believed, what the plaintiff has done is that [585] he has produced a thing in a more expeditious manner, in a more economical manner, and of a better quality. We have then to determine whether the defendants' machine is an infringement of the plaintiff's patent — whether it is a reproduction of the plaintiff's machine with colorable alterations, with the use of what have been called "mechanical equivalents." It appears to me that the defendants have simply made a transposition, that is, that instead of moving the clay against the wires they have made the wires move against the clay. It appears to me that what Mr. *Pole* has said on the subject in his evidence is perfectly accurate. He describes the details of what is done by the plaintiff's machine, and what is done by the defendants' machine, and he says this amounts simply to inverting the relative motions

(1) 1 Webs. Pat. Cas., 409.

of the parts in regard to each other, the essential action and the result produced being identical in the two cases. That is exactly the case of a colorable variation. This machine, which was made by the defendants after they had seen the plaintiff's machine in use, effects the same object; but, according to the evidence (which is not contradicted), it effects it by an enormously greater expenditure of power, as to which we may refer to the language of Lord *Hatherley* in *Daw v. Eley* ⁽¹⁾, to the effect that a clumsy imitation of a patented machine or a patented article may be an infringement, although it is not such as would have been an anticipation defeating the plaintiff's right.

Perhaps I ought, before parting with the case, to refer to the observations of the Vice-Chancellor, that the plaintiff's specification is not sufficient upon the principles laid down by Lord *Westbury* in *Foxwell v. Bostock* ⁽²⁾. I had occasion to deal with an objection grounded on *Foxwell v. Bostock* in the case of *Parkes v. Stevens* ⁽³⁾, and I refer to what I said in that case, because I find it was in substance approved of and affirmed by the Lord Chancellor on appeal. I there said: "It is obvious that a patentee does not comply, as he ought to do, with the condition of his grant if the improvement is only to be found, like a piece of gold, mixed up with a great quantity of alloy, and if a person 586] desiring to find out what was new *and what was claimed as new, would have to get rid of a large portion of the specification, by eliminating from it all that was old and common place, all that was the subject of other patents or of other improvements, bringing to the subject not only the knowledge of an ordinary skilled artisan, but of a patent lawyer or agent." I go on to say: "After all, the question of sufficiency of specification is not a question of law, it is a question really of fact in each particular case. In this case I am of opinion that the patentee has a right to have his specification of 1865 read with his specification of 1862; and, reading them together, I do not think any maker of lamps would have any substantial difficulty in ascertaining what was claimed under the general description of the arrangement and combination of parts hereinbefore described and represented in the drawings annexed." Accordingly, upon the issue of the validity of the patent and the sufficiency of the specification, I found for the plaintiff, although I found for the defendant upon the question of infringement. Both sides appealed, and the present Lord Chancellor, in his judgment, says: "As to the validity of his second patent, which has been disputed, there is a clear line marking off the old from the new" (the objection was that the plaintiff had taken out two patents, each of them for improvements in the same direction and in the

⁽¹⁾ Law Rep., 3 Eq., 496.

⁽²⁾ 12 W. R., 723

⁽³⁾ Law Rep., 8 Eq., 358.

same terms, and that he did not say which part was covered by the old as distinguished from the new), "in a manner which could not be mistaken by anybody properly understanding the English language, and no one would be obliged to have recourse to further investigation (which was the ground of the decision in *Foxwell v. Bostock* ⁽¹⁾) in order to know what parts he might take and what parts he might not take under each patent. I think, therefore, that there is no objection to the specification upon that ground." I am of opinion here, on the same principle, that there is no valid objection to the specification, founded on the decision in *Foxwell v. Bostock*, even if the specification were objected to by the defendants in their answer, which it is not.

Upon the whole, I am of opinion that the plaintiff has made out that he is the true inventor of a new and useful invention, that the defendants have failed to make out any objection to the plaintiff's specification, and the defendants are proved to have [587 infringed the plaintiff's patent. Therefore, I am of opinion that the Vice-Chancellor's decision should be reversed, and that in lieu thereof there should be a decree for a perpetual injunction against the defendants, with the usual consequential direction as to the account to be taken.

SIR G. MELLISH, L.J., concurred.

Solicitors: Messrs. *Vallance & Vallance*; Messrs. *Wilson, Bristol, & Curpmael*.

(¹) 12 W. R. 723.

L.JJ. May 3, 24, 1872.

In re IMPERIAL LAND COMPANY OF MARSEILLES.

HARRIS'S CASE.

[Law Reports, 7 Chancery Appeals, 587.]

Contract — Acceptance by Letter — Revocation — Allotment of Shares — Delegation of Power — New Condition.

A contract is complete when a letter has been posted accepting an offer which can be accepted by letter so sent.

A letter of application for shares in a company was put into the post, and was duly received by the directors. A committee appointed by the directors allotted 100 shares to the applicant, and the secretary of the company put into the post a letter addressed to the applicant informing him that the shares had been allotted to him, and that 10 per cent interest would be charged on the balance due in respect of the shares. The letter was duly received by the applicant, but before he received it he had sent by post a letter declining to accept any shares:

Held, That the contract was completed when the letter announcing the allotment of the shares was put into the post:

Held, that under the articles of association of the company, the allotment of shares by a committee instead of by the whole board of directors, was valid:

Held, that the provision for payment of interest on the balance was not a new term introduced into the contract.

Decision of *Malins*, V.C., affirmed.

Dunlop v. Higgins ⁽¹⁾ discussed.

British and American Telegraph Company v. Colson ⁽²⁾ disapproved of.

In February, 1866, the prospectus of a company in *London*, called the *Imperial Land Company of Marseilles, Limited*, was published, requiring applicants for shares to pay £1 per share on application and £4 on allotment, and stating that interest at the 588] rate of 10 per *cent. per annum would during the construction of the works be paid to the shareholders.

Mr. *Lewis Harris*, of *Dublin*, filled up a letter of application for shares as follows :

"To the directors of the *Imperial Land Company of Marseilles, Limited*.

"Gentlemen, having paid to your credit with the *National Bank* the sum of £200, being the deposit of £1 per share on 200 shares in the above company, I request that you will allot me 200 shares of £20 each in the *Imperial Land Company of Marseilles, Limited*, and I hereby undertake to accept the same, or any smaller number which you may allot to me, and to pay the balance, £19 per share thereon ; and I agree to become a member of the company, and request you to place my name on the register of members, in respect of the shares allotted to me.

"I am gentleman,

"Your obedient servant,

"Name in full : *Lewis Harris*.

"Address in full : 19, *Suffolk Street, Dublin*.

"Profession : Bill broker.

"Usual signature : *L. Harris*.

"Date : 5th March, 1866."

This letter was sent by Mr. *Harris* to the directors through a bank, and was duly received. The directors appointed a committee to allot the shares, and 100 shares were allotted to Mr. *Harris* ⁽³⁾. A letter from the secretary of the company, containing notice of this allotment, addressed to Mr. *Harris* at his *Dublin* address, was put into the post-office at *Lombard Street*. There was some dispute as to the exact time of posting, but the letter was posted either on the 15th or very early in the morning of the 16th of March, 1866, and was received by Mr. *Harris* at *Dublin* on the 17th. This letter, after stating that the directors had allotted to Mr. *Harris* 100 shares in the company, 589] on which a balance of *£300 was payable to the bankers

⁽¹⁾ 1 H. L. C., 381.

⁽²⁾ Law Rep., 6 Ex., 108.

⁽³⁾ The articles of association of the company provided for the appointment of a board of directors, and contained the following clauses : Sect. 7 : "The

shares shall be allotted by and at the discretion of the board." Sect. 87 : "The directors may delegate any of their powers to committees consisting of such number of the members of their body as the directors may think fit."

of the company not later than the 21st of March, 1866, proceeded thus :

“ As the interest warrants attached to the shares bear interest from the 21st of March, 1866, punctual payment of the above balance is requisite. The bankers are instructed not to receive payments after that day without charging interest at 10 per cent. per annum.”

On the 16th of March Mr. *Harris* had written, and put into the post at *Dublin*, the following letter addressed to the directors in *London*, declining to accept shares in the company :

“ Gentlemen,— On the 5th of March instant I paid to your credit into the *National Bank, Dublin*, £200, being a deposit of £1 per share on an application for 200 shares in the above company. I hereby give you notice that, inasmuch as up to this date I have received no allotment, I hereby withdraw the afore-said application, and request you will forthwith return me my deposit of £200, as I shall not accept any shares now allotted, or hold myself in any way liable.”

The secretary of the company answered on the 17th of March that it was too late to withdraw the application for shares; and Mr. *Harris's* name was placed on the register of members as holding 100 shares. Mr. *Harris*, however, by his solicitors continued to deny that he was a shareholder, and much correspondence passed on the subject.

An order was made for winding up the company, and Mr. *Harris*, and two other persons in a similar position, on the 23d of July, 1869, took out a summons to have their names removed from the list of contributories.

The Vice-Chancellor *Malins* dismissed the summons ⁽¹⁾, and Mr. *Harris* appealed.

⁽¹⁾ 1872, March 4.

SIR R. MALINS, V.C., after stating the facts of the case, said, that the first serious objection which had been made on behalf of Mr. *Harris* was that the allotment was altogether invalid as having been made by a committee, and not by the board of directors; and the 7th clause of the articles, stating that the shares were to be allotted by and at the discretion of the board, was relied upon. This was a very serious objection, for if it prevailed the whole allotment was invalid. But the 87th clause provided for the delegation by the directors of their powers to committees. It was therefore clear that the directors might so delegate the duty of allotting shares, and it was very proper that they should do so. On this point *Howard's Case*

(*Law Rep.*, 1 Ch.. 561), was referred to, but in that case there was no valid delegation of authority, and it did not affect the present case. This objection had altogether failed.

Then as to the question of acceptance, and as to when a letter of acceptance became binding. His honor then stated the facts in the case of *Dunlop v. Higgins* (1 H. L. C. 381), and said that if it was the law that a letter was not binding until it was received, then *Dunlop & Co.*, could not have been held to be bound. In *British and American Telegraph Company v. Colson* (*Law Rep.*, 6 Ex.. 108), the letter of allotment was never received. The facts of the present case came to this: The offer made on the 5th of March was a continuing offer on the 15th, when it was duly accepted.

590] *Mr. Cole, Q.C., and Mr. Everitt, for the appellant.

We say that the contract to take shares was not binding until the letter allotting them was received: *British and American Telegraph Company v. Colson* ⁽¹⁾; *Townsend's Case* ⁽²⁾; *Hebb's Case* ⁽³⁾. No doubt there have been cases where a contract has been complete when the letter accepting an offer has been posted; but these were all mercantile cases, in which the law is necessarily different. Until the letter has reached its destination, the acceptance may be retracted: *Dunlop v. Higgins* ⁽⁴⁾.

Moreover, the letter of allotment is not a simple acceptance, introduces a condition as to interest which is a new term: *Oriental* 591] **Inland Steam Company v. Briggs* ⁽⁵⁾; *English and Foreign Credit Company v. Arduin* ⁽⁶⁾.

Another objection is, that the allotment is void as being made by a committee instead of by the directors, in direct contravention of the seventh clause of the articles.

Mr. Glasse, Q.C., and Mr. Higgins, Q.C., for the liquidators, were not called upon.

SIR W. M. JAMES, L.J.:

I feel no doubt whatever as to the proprietary of the judgment of the Vice-Chancellor in this case.

Three grounds have been taken on behalf of the appellant. One is, that upon the construction of the articles of association the allotment was invalid, because it was made by a committee of the directors. But the articles have in terms provided that the directors might delegate anything to a committee; and that they did delegate this duty to this committee appears in evidence before us. It was a proper and reasonable mode of dealing with such a thing as the investigation of the applications for shares

The allotment of shares was made and duly communicated to Mr. Harris by a letter posted before he wrote the letter repudiating the shares. The contract was, therefore, at all events, complete when the letter of allotment was posted; and his letter of repudiation was too late, for he was bound by his letter of acceptance.

The next point relied upon was that the letter of allotment fixed the 21st of March for payment of the call, and provided for payment of interest if the calls were not punctually paid; and this, it was said, introduced a new term. But fixing the 21st of March instead of the date of the allotment, was an extension of time in favor of the allottee; and as to interest the allottee was to receive interest, and could anything be more

reasonable than telling him that he must pay, or in other words would not receive interest unless he paid the money? This was not the introduction of a new term, but a reasonable intimation. The case of the *Oriental Inland Steam Company v. Briggs* (4 D. F. & J., 191), was unlike this, as a new and unusual term was certainly introduced in that case. In *Peck's Case* (Law Rep., 4 Ch., 532), the allottee was held to his contract.

All the objections had failed, and Mr. Harris's name must remain on the list, and he must pay the costs of the summons.

⁽¹⁾ Law Rep., 6 Ex., 108.

⁽²⁾ Ibid., 13 Eq., 148. ⁽³⁾ Ibid., 4 Eq., 9.

⁽⁴⁾ 1 H. L. C., 381.

⁽⁵⁾ 4 D. F., & J., 191.

⁽⁶⁾ Law Rep. 5 H. L., 64.

and the allotment of them. It appears to me, therefore, that there is nothing in that ground of appeal.

The second ground is that on which the greater part of the argument has been addressed to us; that there was a letter posted in *Dublin* recalling the application for shares before the letter posted in *London* containing the notice of the allotment was received in *Dublin*; the letter of revocation not being in the course of post capable of arriving in *London* before the letter of allotment was actually posted by the company.

Now it appears to me that the Vice-Chancellor's decision is correct, and that the contract was completed the moment the notice of allotment was committed to the post addressed to the address in *Dublin* which Mr. *Harris* himself had given. That decision seems to me to be entirely in accordance with a great number of cases in this Court, and to be utterly undistinguishable, in principle or in fact, from *Dunlop v. Higgins* ⁽¹⁾, a case *which is binding upon us, and in which every principle [592 argued before us was discussed at length by the Lord Chancellor in giving judgment. He arrived at the conclusion that the posting of the letter of acceptance is the completion of the contract; that is to say, the moment one man has made an offer, and the other has done something binding himself to that offer, then the contract is complete, and neither party can afterwards escape from it. That is in fact the decision in *Hebbs' Case* ⁽²⁾, though in that particular case a distinction was taken by the Master of the Rolls that the company chose to send the letter to their own agent, which agent had not been authorized by the applicant to receive it on his behalf.

Against this current of authority there is the case of *British and American Telegraph Company v. Colson* ⁽³⁾, in which the Court of Exchequer — not disputing the authority of the previous decisions, because, of course, they could not dispute the authority of a case in the House of Lords — established a distinction which does not apply to this case at all. The Court there held that although the posting of the letter, if the letter arrives, is a complete contract, yet if from any cause, such as a failure of duty by the Post Office, the letter never arrives at all, then there is a difference.

It seems to me not necessary to express any opinion as to whether that distinction is sound or not, but that was the ground upon which the judges proceeded in that case. In this case the letter did arrive, and having arrived the contract was complete, and could not be revoked, from the time when the letter was posted. It was completed in exactly the way which the appellant desired, that is to say, he gave his address in

(1) 1 H. L. C., 381.

(2) Law Rep. 4 Eq., 9.

(3) Law Rep. 6 Ex., 108.

Dublin, and the company, according to the ordinary usage of mankind in those matters, returned their answer through the post. That is a complete contract. It does not signify what was the particular hour of arrival of the one letter or the other, or which was the first, the delivery in *London* or the delivery in *Dublin*. That appears to me wholly immaterial, because the contract was completed at the time when the letter of allotment was properly posted by the company.

The other point raised was, that there was a condition annexed to this allotment letter, and on this point the case of *Eng-593] lish and* Foreign Credit Company v. Arduin* (1) was cited. Now the facts in that case were such as persons might differ about, and the Exchequer chamber held one way while the House of Lords held another way. But the principle upon which they all proceeded, which is the only thing we have to deal with, that where there is an acceptance of an offer, if there is to be a term or condition imposed, it must be clearly so stated, otherwise it is to be considered simply as a notification which may have such effect as it ought to have in a Court of Law. Here the acceptance was unqualified: [His Lordship read the letter of allotment.] It appears to me that the statement as to interest does not introduce a new stipulation. It is not that the allottee is to have the shares provided that he undertakes to pay 10 per cent., but it is that he ought to pay exactly on the 21st of March, 1866, and that by way of indulgence the directors have told the bankers, that if the allottee subsequently pays the same rate of interest which he would be entitled to receive, then they are authorized to receive payment, but not otherwise. It is a mere notification, not intended to be a new stipulation, and it never was considered by the appellant, or by anybody who received such a letter, as a new term introduced. It would be contrary to the usage of all mankind to treat this as being the introduction of a new term, altering or affecting the express acceptance of the application for shares.

I am of opinion, therefore, that the order of the Vice-Chancellor is right, that on all the grounds this appeal has failed, and must be dismissed with costs.

SIR G. MELLISH, L.J. :

I am of the same opinion, and I agree with what the Lord Justice has said on the first and the last grounds, and also on the second ground. The only part of the case upon which I wish to add any observations is on the second ground, which raises a question of very great general importance, and that is this: When a person in one part of the country writes to a person in another part of the country a letter containing an offer, and

(1) Law Rep., 5 H. L., 64.

either directly or impliedly tells him to send his answer by post, and an answer accepting that offer is returned by post, when is a *complete contract made? Is it made at the time when [594 the letter accepting the offer is put into the post, or is it not made until that letter is received? It was contended before us that it is not made until the letter is received; so that until it is received the contract may be revoked by the person who has made the offer.

Now throughout the argument I have been forcibly struck with the extraordinary and very mischievous consequences which would follow if it were held that an offer might be revoked at any time until the letter accepting it had been actually received. No mercantile man who has received a letter making him an offer, and has accepted the offer, could safely act on that acceptance after he has put it into the post until he knew that it had been received. Every day, I presume, there must be a large number of mercantile letters received which require to be acted upon immediately. A person, for instance, sends an order to a merchant in *London* offering to pay a certain price for so many goods. The merchant writes an answer accepting the offer, and goes that instant into the market and purchases the goods in order to enable him to fulfil the contract. But according to the argument presented to us, if the person who has sent the offer finds that the market is falling, and that it will be a bad bargain for him, he may at any time, before he has received the answer, revoke his offer. The consequences might be very serious to the merchant, and might be much more serious when the parties are in distant countries. Suppose that a dealer in *Liverpool* writes to a dealer in *New York* and offers to buy so many quarters of corn or so many bales of cotton at a certain price, and the dealer in *New York*, finding that he can make a favorable bargain, writes an answer accepting the offer. Then, according to the argument that has been presented to us to-day, during the whole time that the letter accepting the offer is on the *Atlantic*, the dealer who is to receive it in *Liverpool*, if he finds that the market has fallen, may send a message by telegraph and revoke his offer.

Nor is there any difference between an offer to receive shares and an offer to buy or sell goods. And yet, if the argument is sound, then for nearly ten days the buyer might wait and speculate whether the shares were rising or falling, and if he found they were falling he might revoke his offer. Those consequences are *very extraordinary, and I always understood the law [595 to be the other way until the case of *British and American Telegraph Company v. Colson* ⁽¹⁾, which has caused some doubt on the subject.

(1) Law Rep., 6 Ex., 108.

I will shortly refer to the previous cases on the subject. The first case is *Adams v. Lindsell* ⁽¹⁾. No doubt there were two points in that case. An offer was sent by post, but the letter was misdirected through the mistake of the party who sent it, and therefore did not arrive until two days afterwards. And that point was disposed of during the argument, that inasmuch as it was the fault of the party sending it, the answer having been written and posted as soon as it did arrive, no advantage could be taken of the delay caused by the misdirection. But the person who sent the offer, finding no answer had arrived, sold the goods before the answer had arrived, and then it was argued that until the answer was actually received there could be no binding contract between the parties, and therefore no breach of it. But the Court of King's Bench said that if the law was so, "no contract could ever be completed by the post. For if the defendants were not bound by their offer when accepted by the plaintiffs till the answer was received, then the plaintiffs ought not to be bound till after they had received the notification that the defendants had received their answer and assented to it; and so it might go on *ad infinitum*." That appears to me to be at any rate an expression of opinion on the part of the Court there, that when an offer is made by letter, and is accepted by a letter which is posted, then there is a binding contract between the parties from the time when the letter is posted.

In *Dunlop v. Higgins* ⁽²⁾ the question was directly raised whether the law was truly expounded in the case of *Adams v. Lindsell*, and the House of Lords approved of the ruling in that case. The Lord Chancellor *Cottenham* said, in the course of his judgment, that in the case of a bill of exchange, notice of dishonour given by putting a letter into the post at the right time had been held quite sufficient, whether that letter was delivered or not; and he referred to *Stocken v. Collin* ⁽³⁾ as an authority on that point, he being clearly of opinion that the rule as to accepting a contract was exactly the same as the rule as to sending notice of dishonour of a bill of exchange. He then referred to the case of *Adams v. Lindsell* ⁽⁴⁾, and quoted the observation of Lord *Ellenborough*. That case therefore appears to me to be a direct decision that the contract is made from the time when it is accepted by post.

There is then the case of *Duncan v. Topham* ⁽⁵⁾, in which there were no doubt several questions, on one of which, whether posting the acceptance was sufficient, Mr. Justice *Cresswell* told the jury that if the letter accepting the contract was put into the Post Office, and lost by the negligence of the Post Office autho-

(1) 1 B. & A., 681.

(2) 1 H. L. C., 381.

(3) 7 M. & W., 515.

(4) 8 C. B., 225.

rities, the contract would nevertheless be complete. There was then a motion for a new trial, and though Mr. Baron *Bramwell*, in *British and American Telegraph Company v. Colson* ⁽¹⁾, has said that he thought the case not properly reported, still it appears as if Mr. *Maule* and Chief Justice *Wilde* both assented to the ruling of Mr. Justice *Cresswell*, and refused the rule on that point.

In addition to that, there is the case of *Potter v. Sanders* ⁽²⁾, which is also a direct decision of a Court of Equity on the point.

Against them there is simply this case of *British and American Telegraph Company v. Colson*, and that is not a direct decision on this point. The Lord Chief Baron, in the course of his judgment, says, it may be that if the letter arrives in time, then the contract will be treated as having been made from the time when the letter was put into the post; but I do not see how there can be any relation back in a case of this kind, as there may be in bankruptcy. If the contract, after the letter has arrived in time, is to be treated as having been made from the time the letter is posted, the reason is that the contract was actually made at the time when the letter was posted. Still that case is not a direct decision on the point before us, though I confess I have great difficulty in reconciling it with the previous decision in *Dunlop v. Higgins* ⁽³⁾. That case was commented on at considerable length both by the Lord Chief Baron and by Baron *Bramwell*, but they only commented on the facts of the case, and showed, which I think they did show, that according to the facts of the case the plaintiff *might very well have had a [597] verdict, even if the rule of law had been that the contract was not made until the letter arrived, because there the only thing which prevented the arrival of the letter was the bad weather, which made the mail very late. And therefore I agree upon the facts of that case, that the plaintiff might have recovered, even although the law was that the contract was not made until the letter arrived. But then the real question before the House of Lords in *Dunlop v. Higgins*, was, whether the ruling of the Lord Justice General was correct in point of law, and the House of Lords held that it was correct.

However, I agree with the Lord Justice that it is not necessary to give any decisive opinion on the point, because although the contract is complete at the time when the letter accepting the offer is posted, yet it may be subject to a condition subsequent that if the letter does not arrive in due course of post, then the parties may act on the assumption that the offer has not been accepted. That, however, is not the case before us; the letter did arrive in due time; and the question is whether,

(1) Law Rep. 6 Ex., 108.

(2) 6 Hare, 1.

(3) 1 H. L. C., 381.

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under that state of circumstances, the parties are bound by the contract.

Solicitors for Mr. *Harris*: Mr. *W. C. Smith*.

Solicitors for the Liquidators: Messrs. *G. S. & H. Brandon*.

L. JJ., May 22, 23, 27, 28; June 11, 1872.

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*FORD v. FOSTER.

[1870 F. 28.]

[Law Reports, 7 Chancery Appeals, 611.]

Trade Mark—*Fancy Name becoming Publici Juris*—*Use of Name in Trade Circulars*—*Misrepresentation in Trade Mark*.

A fancy name which designates a particular kind of article may be in general use in price lists which circulate between manufacturers and retail dealers without prejudicing the right of the inventor to the exclusive use of the fancy name as a trade mark in the sale of the article to the public.

A trade mark to which a trader had originally an exclusive right may in course of time become *publici juris*, and the exclusive right may be lost. The proper test of this having happened is, that the use of the trade mark by other persons has ceased to deceive the public as to the maker of the article.

The exclusive right to the use of a fancy name as a trade mark is not lost by the inventor habitually using it in conjunction with his own name as maker of the article.

The Court will not interfere by injunction to restrain the imitation of a trade mark, if there is false representation in the trade mark, or if the trade itself is fraudulent.

And, *semble*, such false representation or fraud would be a good defence to an action at law for imitation of the trade mark, on the ground that *ex turpi causa non oritur actio*.

But a collateral misrepresentation by the owner of the trade mark will not disentitle him to relief either at law or in equity.

In a case where the plaintiff, whose trade mark was "*Ford's Eureka Shirt*," had falsely represented in his invoices and in a few advertisements that he was a "patentee" of the shirt:

Held, that such false representation was not sufficient to prevent him from sustaining an action at law; and that his right at law being clear, he was entitled to an injunction in Chancery.

Decision of *Bacon*, V.C., reversed.

THIS was an appeal from a decree of Vice-Chancellor *Bacon*.

The bill was filed by *Richard Ford*, of the *Poultry, London*, [612] *shirt maker, against *John Foster* and others, carrying on business as *Foster, Porter & Co.*, wholesale hosiers, in *Wood Street*, in the same city.

In or about the year 1849 the plaintiff, who was then in business in the *Strand*, brought out a shirt of a particular shape, to which he gave the name of "*The Eureka*;" and ever since that time he had carried on an extensive trade in such shirts, and they had obtained a wide reputation.

The plaintiff always marked his shirts on the inside at the back of the collar band with the following mark, enclosed within a line: "*R. Ford's Eureka Shirt, London*," to which he added,

after the passing of the *Merchandise Marks Act*, 1862 (25 & 26 Vict. c. 85), the words "Trade Mark;" and the plaintiff always described his shirts in all advertisements and elsewhere as "*Ford's Eureka Shirts*."

The bill, which was filed in February, 1870, alleged that the plaintiff had recently discovered that the defendants had for some time been manufacturing and selling to the trade shirts which they described as "*The Eureka Shirt*," by which the public were misled, and the plaintiff's business materially injured; that the shirts manufactured by the defendants were marked beneath the inside of the collar band with the words "*The Eureka Shirt*" within a shield-shaped border, and with a crown on the top; and that they were in the habit of issuing trade cards and price lists, advertising themselves as manufacturing and selling "*The Eureka Shirt*." The plaintiff accordingly prayed that the defendants might be restrained "from applying the mark or title of "*Eureka*" to any shirts manufactured by them, or to any shirts sold by them, unless such shirts had been manufactured by the plaintiff; and from advertising for sale shirts as "*Eureka*," by issuing boxes, cards, or price or trade lists, or other advertisements, in which the mark or title "*Eureka*" should be applied to shirts not of the plaintiff's manufacture; and for an account, and other consequential relief."

On the 19th of March, 1870, the plaintiff moved for an injunction before Vice-Chancellor *James*, who ordered that, upon the defendants undertaking not to apply the word "*Eureka*" to any shirt sold by them, except by the use of the words "*Foster, *Porter, & Company's Improved Eureka*," the motion should [613 stand to the hearing, without prejudice to any question.

This order was taken by appeal to Lord Justice *Giffard*, who, on the 25th of March, 1870, varied the order by striking out the undertaking, and directing that notice of motion for a decree should be given within a week, the plaintiff waiving his right to an answer (').

(') 1870, March 25.

SIR G. M. GIFFARD, L.J., after observing that he thought the Vice-Chancellor quite right in directing the motion to stand to the hearing, continued:

Besides that, looking at the whole of the evidence, there are two very serious questions for decision at the hearing. The one is, whether the evidence can be brought to such a point as to make out that "*Eureka*" is *publica jure*. That is one very serious question, and of course upon that I shall not for one moment express an opinion.

The other very serious question is, whether the plaintiff is or is not precluded from suing by reason of his having described himself in his invoices to a very considerable extent as "patentee" of *Ford's Eureka Shirts*. when, in fact, he is not the patentee of those shirts.

Upon these two points I shall certainly express no opinion at this moment; and I do not think that in that respect *Sir John Roll's Act* has made the slightest difference. I take it that upon interlocutory applications what this Court considers is this: whether

614] *Both parties went into evidence at considerable length, both before and after the hearing of the motion for an injunction.

In one of his affidavits the plaintiff stated that he had been frequently informed that shirts stamped or marked with his trade mark of "*Eureka*" were being made and sold in the *United Kingdom*, and were also being shipped abroad; but until very recently he had failed to discover by whom the same was being done. He then said that in January, 1870, he received from a Mr. W. H. Turnell, of *Wellingborough*, a shirt as a sample, accompanied by a letter, asking for a dozen shirts to match it, and for a quotation of the lowest price. The plaintiff having answered this request Turnell replied to the effect that he could get the shirts made at 18s. per dozen less, and asked the plaintiff, if he did not choose to supply the shirts at the price required, to send the pattern shirt to Messrs. *Foster, Porter, & Co.* The plaintiff stated that in consequence of the information contained in that correspondence, he made inquiries, and ascertained that shippers had obtained shirts from the defendants marked as "*The Eureka Shirt*."

He further said that he had, by the course pursued by the defendants in using his said trade mark, sustained loss and damage amounting annually to many hundreds of pounds; and in

under the old practice it would have granted an injunction directing an action at the same time, or whether it would have abstained from granting an injunction, and then directed an action. Sitting here in the Court of Appeal, if I were to grant this injunction, it would be morally impossible for the Vice-Chancellor at the hearing to do otherwise, unless upon evidence almost wholly different from that which is before me; whereas, under the old practice, if I were to grant the injunction the Court of Law would not pay the slightest attention to any opinion I might have expressed. An expression of my opinion now upon an interlocutory motion would be all but binding on the Vice-Chancellor. Therefore, unless I was convinced that the case was perfectly clear, I certainly should not grant it, because although we now take undertakings for damages, we know perfectly well that these undertakings for damages are not a sufficient compensation to a defendant against whom they may happen to be improperly granted.

For these reasons I am of opinion that the Vice-Chancellor was perfectly

right in directing the motion to stand to the hearing.

[His Lordship then proceeded to show why he considered the undertaking prejudicial to the plaintiff.]

In fact, such an undertaking must be founded on the opinion that any person looking at such an expression as "*Foster, Porter, & Co.'s Improved Eureka*," would think he was buying Ford's "*Eureka Shirts*." In that opinion I confess I do not concur; and I think it is right I should say so, because it is plain to me that the term "*Eureka*" is the whole gist of this case; and if the plaintiff's sole right is to use the term "*Eureka*" in connection with his own name, he has not a right which is worth anything whatever. I cannot but think that, supposing a person sees the term "*Eureka*," whether in conjunction with the name "*Fords*," or the word "*Improved*," or the words "*Foster, Porter, & Co.'s Improved*," he would not take the least notice whether it was Ford's, or Foster's & Porter's, or any one's else.

With that exception, I desire that the matter should go to the hearing quite unfettered and unprejudiced.

a further affidavit he said that he had in advertising his said shirt expended a sum exceeding £7000.

The general effect of the evidence adduced by the defendants was that the name "*Eureka*" was of common use in the shirt trade, as applying to shirts of a particular shape, but without reference to any particular maker, and that in a few instances it was used in the price or trade lists of manufacturers of shirts; but the defendants failed to establish the fact that any other dealers except themselves had stamped the name "*Eureka*" on the shirts.

Mr. Walton, who had been for twenty years buyer in the defendants' shirt department, gave the following account [615 of the circumstances under which the name was first used by the defendant: "From the year 1862 and forward the firm of *Foster Porter & Co.*, sold shirts under the name of '*The Eureka Shirt*,' and the firm issued price lists to that effect from that time, and they have always been called in the price lists '*Eureka*,' and '*Improved Eureka*.' As buyer for the firm I make up the price lists, and had no particular reason for using the word '*Eureka*,' except that fancy names were then very fashionable, and as applied to shirts it was a name universal in the trade. I knew that *Ford* was using it at that time. I had at that time (1862), seen the advertisement of *Ford's Eureka Shirts* in his window. *McIntyre, Hogg, & Co.*, used the term in 1862. I do not know anyone else who used the term. The shirts were made to our order from samples submitted to *McIntyre, Hogg, & Co.*, by us. They delivered them to us from the first as *Eureka* shirts. Some member or buyer in that firm recommended me to call the shirts *Eureka*, and I did so. They got the stamps printed and attached them before they delivered the shirts to us. The stamp was designed by the printer. *Eureka* shirts had not been much demanded before that time. The price list of 1863 contains an advertisement of shirts 'of *Eureka* and *Cuirass* shape.' '*Eureka*' is a word that has been used for twelve years for scarves. The improvement in *Eurekas* referred to in the price list as '*Improved Eureka*' referred to improvements in the wristbands, and so on."

Mr. Hogg, a member of the firm of *McIntyre, Hogg, & Co.*, shirt manufacturers, confirmed this statement.

The defendants also produced evidence to show that in the year 1854, a person named *Ford*, a relative of the plaintiff, sold shirts which he called "*Eureka*" on the boxes and invoices, for about a year, with the knowledge of, and without any interference from, the plaintiff; also that a shirt maker named *Stroud*, whose shop was within a few doors of the plaintiff's, had for several years before the filing of the bill sold and advertised

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shirts as "*Stroud's Eureka Shirts*," and had exhibited a board in front of his shop with those words conspicuously painted on it.

The defendants also proved that the plaintiff had been in the habit of printing invoices and bill heads in which he had de-
616] scribed *himself as "patentee" of *Ford's Eureka Shirts*, and they also produced advertisements which appeared in the year 1864, in the *Standard* and other newspapers, and in the *Cornhill Magazine*, which were headed "*Ford's Eureka Shirts*," and ended with the words "*Richard Ford & Co., patentees.*"

In reply to this evidence the plaintiff stated that he first adopted that form of invoice in 1857 or 1858, and that those invoices were never sent with the goods to the purchaser, but were inclosed in a distinct envelope. He also stated that he had never publicly advertised his shirt as patent, although he had advertised himself as a patentee, being the patentee of the *Mimema Shirt*; that no price list of his contained any statement that the *Eureka* was a patent shirt, or that the plaintiff was the patentee of the *Eureka Shirt*; and that the word "patentee," as applied *Eureka* shirts, had now been withdrawn from his bill heads and invoices.

In one of his later affidavits the plaintiff exhibited the cover of one of his shirt boxes, on which was printed in large letters the following notice: "Caution! Caution! *Ford's Eureka Shirts*! As other shirts are sold as '*Ford's Eureka's*,' please observe none are genuine unless stamped with the trade mark inside the collar."

Under these circumstances the Vice-Chancellor was of opinion that the plaintiff had not made out his claim to the use of the name "*Eureka*" as a trade mark; and also that he had dissented himself to relief in this Court by falsely calling himself a patentee. He accordingly dismissed the bill with costs (¹).

(¹) 1872, Jan., 18.

SIR JAMES BACON, V.C.:

It appears to me that very little of the evidence that has been adduced in this case has any direct application to the question before the Court.

As for the cases that have been cited, I will make this observation: the cases upon trade marks will, in the decision of them, necessarily extract from the Judge, whoever he may be, a variety of observations which he intends only to apply to the case before him, but which, by the generality of the expression, may be thought to lay down some general rule. The law upon the subject of trade-marks has been the same for a great many years. It has undergone no change that I know of. A more strict definition

perhaps of trade marks is contained in the 1st section of the *Merchandise Marks Act*, 1862 (25 & 26 Vict. c. 88), than had ever been before expressed in terms so authoritatively; but the same thing has at almost all times existed, and the same law, according to my notion, has at all times been applied.

The meaning and use of a trade mark is, that some person dealing in goods, no matter of what kind, whether of his own manufacture or not, having a certain defined shape, if he stamps upon them some indication that that particular article is his and his only, may thereby acquire so far an exclusive right to it as that no man may imitate his mark, and the legal right goes no further than that.

L.JJ.

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*Mr. Little, QC., and Mr. Caldecott, for plaintiff: [617

It is undisputed that the plaintiff invented this shape of shirt and gave it the name *Eureka*; that from the beginning he

The case, as I have said, establish that. The recent statute does the same thing in more distinct terms. [His Honor then referred to the statute, and continued:]

This bill is a bill to establish the plaintiff's right to his trade mark, and the first question, and that which must govern the decision of the case, is, what is his trade mark, and what has he pleaded as being his trade mark? Now the bill, which is very clear and distinct, asserts that in the year 1849, he brought out a shirt, which he describes, and gave to the shirt so brought out, made, and sold by him, the name of "*Eureka*." From 1849 to the present time he has advertised that, and done a valuable and extensive business; and ever since the year 1849 sold, and is now selling, the shirt under the mark or title of "*Eureka*," and has gained a valuable reputation; and he says that that shirt has been, since the year 1849, and is now, known in the trade and to the general public as the "*Eureka*" shirt; and then he alleges that he has always marked his said shirts on the inside, at the back of the collar band thereof, with the following mark; "*R. Ford's Eureka Shirt London*."

Upon those allegations the whole case made by this bill is and must be, according to the facts proved, not to restrain the defendants from using the trade mark in which the plaintiff's right consists, but to restrain the defendants, according to the frame of the prayer, from applying the mark or title of "*Eureka*" to any shirt manufactured by the defendants, and from issuing any boxes, cards, or or price or trade lists, or other advertisements, on which the mark or title "*Eureka*" shall be applied.

Now, what is there to justify that? The plaintiff's assertion is in effect this: "From the time that I invented the shirt that I called by the name of '*Eureka*' I have always protected such right of property as I have in it by putting upon it the inscription '*R. Ford's Eureka Shirt London*.'" There is no pretence for saying that the defendants have ever imitated or copied that inscription. They have adopted the name "*Eureka*," and it is suggested

in the pleadings, but as I think, not properly suggested, that that is an invasion of the trade mark. But what is the plaintiff's case about this? From the year 1849; when he brought out this shirt and gave it the name "*Eureka*" it is proved in evidence, clear, conclusive, and without an attempt at contradiction, that it has been well known to the trade as the "*Eureka*" shirt, and that without reference to any right the plaintiff had at all. But what further does the plaintiff say? Over and over again in the course of the argument it has been said that the plaintiff does not seek to shut up the defendants' mouth. "They make call it '*Eureka*' shirt if they like, they may make it of the identical shape, but they shall not mark it." Why not? If they have a right to make it, by what name are they to call it? Nobody has ever called it anything but the "*Eureka*." And if they may call it so in words, why may they not stamp upon a shirt when they have made it that name by which they and all the rest of the world call it? There is one thing, and one only, they must not do; they must not say that this *Eureka Shirt* which they offer sale is "*Ford's Eureka Shirt*."

The case really, without referring to all the abundant evidence that has been gone into, reduces itself to the narrowest possible proportions and is of the plainest kind. The use of the name is not claimed by the bill, except in the way I have pointed out. It cannot be claimed as a matter of fact. "*Eureka*" is not the trade mark; and where is the case to prove or establish that taking one word out of the trade mark will be an invasion of the trade mark? From 1849 to 1860, these defendants had nothing to do with it, but it is in evidence that other persons did make *Eureka* shirts, and did sell them commonly. Whether they stamped them or not is not clearly in evidence. If they did, in my opinion, they did no more than they were justly entitled to do; if they did not, the omission to stamp them cannot better the plaintiff's case. [After some further remarks on the facts proved in the case, his honor continued:]

Then it has been argued that it is

marked his shirt with that mark, and that he has spent large [618] *sums in advertising them. The words "trade mark,"

not necessary there should be any proof that any one has been misled by the use of the word "*Eureka*" by the defendants. If it is not, it is at least necessary to show that it was "calculated" in the words of the bill "to mislead." But is it calculated to mislead? When for nearly twenty years before the filing of the bill the plaintiff has taken pains, and successful pains, to tell the whole world that his "*Eureka*" shirt bears his trade mark upon it, what reason is there for me to believe that anybody could possibly be misled by seeing a shirt upon which was only the single word "*Eureka*?" If "*Eureka*" had been a separate and distinct trade mark, that would have been different. But under these circumstances how can I, with any kind of justice, infer that the word "*Eureka*" being printed in a small escutcheon and stamped upon the neck of a shirt, would lead anybody to believe that it was *R. Ford's* "*Eureka*" shirt?

Upon the ground, then that he has permitted the public to use and make this shirt, and that this shirt has but one name, and cannot properly be called by any other name than that which he himself given to it, I think he has no right whatever to complain against the defendants. I think that the public use of it during that time, under the circumstances proved, has precluded him, if he could do so upon any other ground, from claiming the exclusive use of the single name "*Eureka*."

I bear in mind that when this matter was discussed at length in this Court, and when the plaintiff was heard at full length before the Lord Justice Giffard, the Lord Justice said that there were two questions which whenever the cause came to be heard will deserve serious attention. One is the public use, and upon that, in my opinion, the evidence is overwhelming. The use has been public, and I do not hesitate to say, to my satisfaction it has been proved to be a public use with the knowledge of the plaintiff.

There remains only the other question to consider, that of the patent. Now I should not like to fritter away that wholesome doctrine of the Court,

that if a man comes here invoking the aid of a Court of Equity for the protection of what he calls a legal right, he is bound to show that he has dealt honestly with that right. Is there any honesty in this instance? Mr. *Caldecott*, with great ingenuity, and also I may say with great candour—for he has not permitted his ingenuity to overstep the candour which always characterizes anything he has to say to the Court—has endeavored to distinguish those authorities. He says it was not until 1857 that the plaintiff lapsed into this practice of calling himself a patentee, and he says that, the plaintiff's conduct having been "pure" up to a certain time, it cannot be rendered impure by his subsequent conduct. I admit no such principle as that; for if I were to say that that was to be the rule of the law, as far as I have to declare the law, it would only be necessary for a man one day to stamp his shirt with a trade mark, and the next day or the next week to say to the world, "that is my trade mark, I will sell you these shirts, and when I sell them to you I give you a bill of parcels, and tell you upon it that I am the patentee of that shirt which bears that trade mark." How can I establish such a principle as that a man is at liberty at any time he likes to say to the public, "I am a patentee?" What is the consequence of his so saying? Suppose a buyer of shirts under one of these invoices were greatly struck with the beauty and excellence of the shirt. He might say to himself, "If I were at liberty to make these shirts I could make them on better terms than this man sells them to me, but I dare not, because he is the patentee; I am precluded; he has an exclusive right." It is a positive assertion, from the year 1857 at least, that Mr. *Ford* is the patentee of that shirt, the distinctive property in the sale of which is vested in him, and to which his title deed is that stamp which he has put upon it. If the rule were a too strict one it is too well established for me to meddle with it. But I think it is founded upon the most perfect good sense and justice. I think that persons ought not to be at liberty to hold themselves

which were added afterwards, were not essential part of the trade mark. The evidence of the defendants fails to show that from 1849 to 1862 *any one but the plaintiff used the word as [619 a mark on shirts; but in 1862 the defendants adopted it, and in 1863 they issued a circular in which they spoke of shirts "of the *Eureka* and *Cuirass* *shape." The plaintiff does not [620 complain of the defendant's making shirts of the "*Eureka*" shape, but of stamping them and advertising them as "*Eureka*" shirts, by which the public is liable to be misled. It is not necessary for the plaintiff to prove that persons have been actually misled; the tendency to mislead is sufficient to sustain an action at law and to entitle the plaintiff to relief in equity: *Sykes v. Sykes* (1); *Seixo v. Provezende* (2); *Flavel v. Harrison* (3); *Edelsten v. Edelsten* (4); *McAndrew v. Basset* (5); *Croft v. Day* (6). Although the plaintiff has always appended his own name to the trade mark, calling the shirts "*Ford's Eureka Shirts*," that circumstance does not lessen his right to the exclusive use of the term "*Eureka*": *Braham v. Bustard* (7); *Millington v. Fox* (8); *Kinahan v. Bolton* (9); *Cocks v. Chandler* (10) *Hall v. Barrows* (11); *Ainsworth v. Wainwright* (12); *Wotherspoon v. Currie* (before the House of Lords, April 19, 1872). No case of acquiescence has

out as being patentees when they have no such right.

[His Honor then referred to *Millington v. Fox* (3 My. & Cr., 338) and *Kinahan v. Bolton* (15 Ir. Ch., 75), which cases he distinguished from the present, and continued:]

I desire it to be understood that my decision of this case proceeds upon this, that the plaintiff has not, and never had, any exclusive right to the word "*Eureka*" as a word; that as far as the word "*Eureka*" is inserted in his trade mark he has a right to that, but only as a part of his trade mark. That trade mark has never been in any degree interfered with or imitated, either by advertisement or representation, or otherwise, and therefore the plaintiff has nothing to complain of in that respect. Then if he says that, in general, making *Eureka* shirts, and selling them, is against any other right that he may possess, I say he is precluded from saying that by the conduct which he has pursued respecting his advertisements, and especially his bill heads; for there I say he has made a direct, wilful, and false representation, one which might have been injurious, which certainly would be inconvenient, to any person who might take his word for his being a patentee of the "*Eureka*" shirt,

and therefore be deterred from making it himself. The advertisements in newspapers, the advertisements in the *Cornhill Magazine*, the advertisements, if they are to be so called, upon the invoices or bill heads, which go further than advertisements, for it is a transaction between the buyer and the seller, all that is, in my opinion, a clearly holding out and announcing himself to the public as a person whose right to sell the shirts which he thus sold, as mentioned in the invoices, was protected by a patent, and that that was false is abundantly proved,

Under these circumstances, I am of opinion that there is no ground whatever upon which this suit can be sustained. The bill therefore must be dismissed, and it must be dismissed with costs.

(1) 3 B. & C., 541.

(2) Law Rep. 1 Ch., 192.

(3) 10 Hare, 467.

(4) 1 D. J. & S., 185.

(5) 12 W. R., 777.

(6) 7 Beav., 84.

(7) 1 H. & M., 447.

(8) 3 My. & Cr., 338.

(9) 15 Ir. Ch. Rep., 75.

(10) Law Rep. 11 Eq., 446

(11) 33 L. J. (Ch.), 204.

(12) Law Rep. 1 Eq., 518.

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been proved against the plaintiff. The use of the mark by *C. Ford* and *Stroud* are too insignificant to affect his right. The right of the plaintiff being based upon property, such instances of acquiescence will not defeat it: *Johnson v. Wyatt* ⁽¹⁾.

621] *The only remaining point is the use of the word "patentee." But that word was not used in conjunction with the trade mark, and even if had been, that circumstance would not have been sufficient to disentitle him to relief at law or in equity: *Sykes v. Sykes* ⁽²⁾; *Marshall v. Ross* ⁽³⁾. In *Pidding v. How* ⁽⁴⁾; *Perry v. Truefitt* ⁽⁵⁾, *Fluvel v. Harrison* ⁽⁶⁾, and *Leather Cloth Company v. American Leather Cloth Company* ⁽⁷⁾, the misrepresentation was with respect to the article to be protected, and the Court refused to protect the sale of a thing which was in itself a fraud upon the public. That is not the case here. The misrepresentation was only collateral. Nor was there any misrepresentation at all to the public except in a few advertisements in 1864, and the plaintiff has now ceased to use the words in his bill heads and invoices.

Mr. Kay, Q.C., and Mr. H. A. Giffard, for the defendants:

The name "*Eureka*" was originally a fancy name applied to a particular shape of shirt, not shirts made or sold by a particular trader; and as such it has become *publici juris*, and is used both by the trade and the public to designate that shape without distinction of the seller. Every one, therefore, has a right to use it, and the Court will not grant an injunction to restrain them any more than to restrain persons from advertising "*Broughams*," "*Wellington boots*," or "*Harvey's sauce*," all of which were originally fancy names. The defendants never sold or advertised these shirts as *Ford's Eureka shirts*," which is the only trade mark to which the plaintiff is entitled. Even though the name "*Eureka*" may have been originally a trade mark, it has now become *publici juris*, and the plaintiff has lost his exclusive right by his acquiescence. He did not interfere with *C. Ford* or with *Stroud*, whom he knew to be openly selling shirts as *Eureka* shirts, and he must also have seen numerous price lists and trade circulars in which *Eureka* shirts were advertised. Under such circumstances the Court has always refused an in-

622] junction: *Canham v. Jones* ⁽⁸⁾; *Woolham v. Ratcliff* ⁽⁹⁾; *Lee v. Huley* ⁽¹⁰⁾; *Wotherspoon v. Currie*; *Dent v. Auction Mart Company* ⁽¹¹⁾; *Collin & Company v. Brown* ⁽¹²⁾; *Browne v. Freeman* ⁽¹³⁾.

⁽¹⁾ 2 D. J. & S., 18.

⁽²⁾ 3 B. & C., 541.

⁽³⁾ Law Rep., 8 Eq., 651.

⁽⁴⁾ 8 Sim., 477.

⁽⁵⁾ 6 Beav., 66.

⁽⁶⁾ 10 Hare, 467.

⁽⁷⁾ 11 H. L. C., 523.

⁽⁸⁾ 2 V. & B., 218.

⁽⁹⁾ 1 H. & M., 259.

⁽¹⁰⁾ Law Rep. 5 Ch., 155.

⁽¹¹⁾ Ibid., 2 Eq., 238.

⁽¹²⁾ 3 K. & J., 423.

⁽¹³⁾ 13 W. R., 305.

But whatever the plaintiff's legal rights may be, he has disentitled himself from obtaining relief in this Court by the misrepresentation contained in his invoices and advertisements. If the Court granted an injunction it would be aiding the plaintiff to commit a fraud: *Piddling v. How* ⁽¹⁾; *Perry v. Truefitt* ⁽²⁾; *Morgan v. M'Adam* ⁽³⁾; *Eldelsten v. Vick* ⁽⁴⁾; *Lamplough v. Bulmer* (before Vice-Chancellor Wood, December 3, 1867). It is impossible to draw a distinction between a misrepresentation in the trade mark and elsewhere, and in some of the cases cited there was no misrepresentation in the trade mark.

Mr. Little, in reply.

SIR W. M. JAMES, L.J. :

In this case the plaintiff complains of the defendant that they have invaded his trade mark. The plaintiff's case is that he, being a shirt maker in London, invented a particular form of shirt, to which he gave the name of "*Eureka*," and that he used as a trade mark, which he affixed to the shirts, the words "*Ford's Eureka Shirt*;" and he complains that he having used this trade mark for several years, the defendants have used the word "*Eureka*," affixing it to a shirt in exactly the same place as the plaintiff affixed his mark; and that they have also used boxes containing small quantities of shirts, just as much as one purchaser would buy, with the mark "*Foster, Porter, & Company's Improved Eureka*." Thus stated, the case seems to me *prima facie* to be one of the plainest and simplest cases ever brought into Court. It seems to me to be utterly impossible to distinguish this case from the case of *Braham v. Bustard*, ⁽⁵⁾ where a man had a trade mark upon which was the word "*Excelsior*," and another man applied the word "*Excelsior*" *to white [623 soft soap; or from the older case of *Millington v. Fox* ⁽⁶⁾, where persons used the name of *Millington* as part of the mark upon some steel; or from the case, in *Ireland*, of *Kinahan's v. Bolton* ⁽⁷⁾, with respect to the use of the initials "*L. L.*" in "*Kinahan's L. L. Whisky*," which the defendant endeavored to invade by calling his whisky "*Boltons L. L. Whisky*." The plaintiff makes this *prima facie* case — that he has a plain trade mark, a material and substantial part of which has been taken by the defendants. Then the onus is, under those circumstances, cast upon the defendants to relieve themselves from that *prima facie* liability. Their defence consists in substance of two parts. One is that the word "*Eureka*" had become *publici juris* — that it had ceased, in fact, to be part of the plaintiff's trade mark, or essential to

⁽¹⁾ 8 Sim., 477.

⁽²⁾ 6 Beav., 66.

⁽³⁾ 36 L. J. (Ch.), 228.

⁽⁴⁾ 11 Hare, 78.

⁽⁵⁾ 1 H. & M., 447.

⁽⁶⁾ 3 My. & Cr., 338.

⁽⁷⁾ 15 Ir. Ch. Rep., 75.

any trade mark; that it had become a word like "Wellington" as applied to boots, descriptive, not of the plaintiff's shirts, but descriptive of a form of shirt, and that it was known in the market and to all the public as the name and description of that particular form.

Now, in considering the question as to whether or not it is *publici juris*, I think it is important to regard a little the history and chronology of the case. [His Lordship then referred to the evidence the effect of which is stated above, particularly to the affidavits of Mr. Walton and Mr. Hogg, and continued:] It appears to me to be clearly made out that, at the time when one of the defendants' shirts were sent to *McIntyre, Hogg, & Co.* by the defendants, and shirts were made by *McIntyre Hogg & Co.* for them of the *Eureka* shape, and up to that time, there was not any use of the word "*Eureka*" as applied to shirts in any sense whatever in the market. There was, during an interval—I think during one year, the year 1854—a relation of the plaintiff of the name of *Ford*, who seems to have sold shirts (it does not appear whether they were marked or not) as "*Ford's Eureka Shirts*," and he was not, apparently, interfered with by the plaintiff. That however, did not last for more than a year, and whatever wound that might have inflicted upon the plaintiff's property, it appears to me that must be considered to have been entirely healed long before this transaction of the defendants' took place. With the exception of that, so far the evidence 624] goes, it appears that *not a single shirt had ever been advertised, or marked in such a way as to get into the hands of the public, with the name "*Eureka*." It is in evidence that the shape itself became from the first very popular, and that a great number of persons used the shape, as they lawfully might; and to some extent it appears that, as between the shirt maker and his cutters, as between persons engaged in the trade, with regard to whom the use of the word would not be calculated to deceive, the word "*Eureka*" was used. A man might say, "I want one hundred dozen *Eurekas*," or he might say, "I want one hundred dozen *Fords*"—that is to say, between them that signified so many dozen shirts made after the pattern of Mr. *Ford's* shirts, which was perfectly lawful; but at the time when the defendants began their operations it does not appear to me that there was any use of the word "*Eureka*" as between any seller and any ordinary buyer, or that there was anything whatever which intended to show that the word "*Eureka*" meant at that time anything but the shirt manufactured by the plaintiff himself. That was, in my judgment, the state of things at the time when the piracy by the defendants began; and I think it is to be lamented that Mr. *Walton* and Mr. *Hogg* did what they

did—that is to say, used the word *Eureka*, and stamped that word in exactly the same place as that in which the plaintiff placed his trade mark. They did that apparently with an unconsciousness—they naïvely disclose in their evidence—that it was a most improper attempt to obtain the benefit of the reputation which Mr. Ford had acquired for his shirts by the merit of the manufacture itself, and by his persistent and expensive advertisement of it in all parts of the kingdom. At all events it was, in my judgment a most improper violation of the plaintiff's right at that time, and if the plaintiff had then discovered it, and had then filed his bill to restrain the use of that word "*Eureka*" by the defendants, he must have succeeded in his suit. Then what has occurred since? A great deal of evidence has been given as to the common use of the word "*Eureka*;" but if we eliminate from that mass the evidence of the use of the word which is to be traced directly to the operations of the defendants themselves—the use of it by the persons who are the shopkeepers who have bought from the defendants, the use of it by shippers *who have bought from the defendants for [625 the purpose of shipping to the colonies, where the *Eureka* shirts seem to be in request—it appears to me that the evidence of the use of the word *publici juris* is reduced to a very small amount indeed. It is not to be overlooked that, with the single exception of *Stroud*, who for the last year or two is proved to have put over his door "*Stroud's Eureka Shirts*," where the evident intention to distinguish his shirts from *Ford's Eureka Shirts* might, perhaps have made it difficult to interfere with him, there is no evidence that in the whole of *London* there has been any use of the word "*Eureka*" in such a way as to affect the question before us by any person whatever except the defendants. It has been said that one murder makes a villain and millions a hero; but I think it would hardly do to act on that principle in such matter as this, and to say that the extent of a man's piratical invasions of his neighbor's rights is to convert his piracy into a lawful trade. That ground of defence, therefore, in my judgment, fails.

The next and more difficult point, in my judgment, is that which is clearly proved in this case, that the plaintiff himself has been guilty of misrepresentation with respect to his trade, not indeed in the trade mark itself nor in the manufacture, but by several collateral representations. He has by advertisements, extending over the year 1864, in several publications, and, which is more important, in every invoice, which he gave to every purchaser, for several years described himself as patentee of this shirt. That is to say, he has represented that in addition to the protection of the trade mark, his article is protected by patent.

There have been several cases in this Court in which that misrepresentation has been held to be to some extent fatal to a plaintiff's case. In *Pidding v. How* ⁽¹⁾, the case of the *Howqua Mixture*, in *Perry v. Truefitt* ⁽²⁾, which was the case of the *Mexican Balm*, in *F'lavel v. Harrison* ⁽³⁾, which was the case of a patent kitchener, and in the *Leather Cloth Company v. American Leather Cloth Company* ⁽⁴⁾, the Judges held that the misrepresentation debarred the plaintiff from the relief which he then sought. But Mr. *Little* has drawn our attention to this important consideration *that in most of these cases the fraud was in the trade mark itself, and further, that in the cases of *Pidding v. How* ⁽¹⁾, *Perry v. Truefitt* ⁽²⁾, and *F'lavel v. Harrison* ⁽³⁾, the master of the rolls and the Vice-Chancellor *Wood*, the present Lord Chancellor, thought that the proper course to pursue was to retain the bill for a year, with liberty to the plaintiff to bring such action as he might be advised, thereby implying, as it seems to me, that if he succeeded in his action he would come back to this Court and be entitled to the injunction, which would be the ancillary remedy which this Court gives for the further protection of his legal right. That course is not open to us now. We are obliged to determine both the legal right and to apply the equitable remedy which is the result of that legal right.

Now in this particular case I am satisfied, for reasons which the Lord Justice *Mellish* will go into more fully than is necessary for me to do, that this collateral misrepresentation of the article being protected by patent would be no defence at law, and we are satisfied that we ought to determine the legal right in his favor; and the legal right being so determined in his favor, we think he then is in the same position as if in the cases which I have referred to he had gone to law and had succeeded in the action. I am of opinion, therefore, that having determined the legal right which he has established to be in him he is entitled to the ancillary equitable remedy, that he is entitled to any injunction, very much in the same terms as that which was granted in *Millington v. Fox* ⁽⁵⁾, an injunction to restrain the defendants from using the word "*Eureka*," or any other part of the trade mark of the plaintiff to any shirts manufactured by them, or to any shirts sold by them, unless such shirts were manufactured by the plaintiff, and from issuing boxes, cards, or labels on which the mark "*Eureka*" shall be applied to shirts not of the plaintiff's manufacture. I do not think it right to extend the injunction to price lists or trade circulars, or other advertisements of that kind, because the fraud that is committed is a fraud that is committed with respect to the ultimate pur-

⁽¹⁾ 8 Sim., 477.

⁽²⁾ 11 H. L. C., 523.

⁽³⁾ 6 Beav., 66.

⁽⁴⁾ 10 Hare, 467.

⁽⁵⁾ 3 My. & Cr., 338.

chaser. The trade circulars and the price lists are things between the defendants or the manufacturers and the shopkeepers or *other dealers, who are not deceived by them, and [627 what is important is, not to restrain the parties, who know exactly what they are dealing in and what they are talking about, from the use of the word "*Eureka*," which they may fairly and honestly use to describe the thing or shape itself, but from their doing that in such a way as to induce an unwary or ignorant purchaser to believe that the thing he is getting is the article manufactured and advertised by the plaintiff.

The question remains as to what ought to be done with respect to the account. Having regard to the fact that we are establishing a legal right, that we are also giving an equitable remedy ancillary to and consequent upon that legal right, and having regard to the fact that the plaintiff did certainly make a misrepresentation, which he was not justified in making, in his advertisements and invoices, and also to the fact that the plaintiff seems to have been not very vigilant in endeavoring to ascertain who were interfering with his trade mark, and having regard also to the probability that the extent of the trade of the trade of the defendants would by no means be a measure of the injury done to the plaintiff himself, because the plaintiff does not appear to have anything like the extent of the trade of the defendants; having regard to all these circumstances, we are of opinion that the account should not be earlier than the filing of the bill. The plaintiff will therefore be declared to be entitled to the ordinary account from the filing of the bill, with the costs of the suit.

SIR G. MELLISH, L.J. :

I am of the same opinion. When this case was before Lord Justice *Giffard*, on the hearing of the appeal with respect to the motion for injunction, he said: "There are two very serious questions for decision at the hearing; the one is, whether the evidence can be brought to such a point as to make out that '*Eureka*' is *publici juris*. The other very serious question is, whether the plaintiff is or is not precluded from suing by reason of his having described himself in his invoices to a very considerable extent as patentee of '*Ford's Eureka Shirts*,' when in fact he is not the patentee of those shirts."

I am of opinion that the Lord Justice *Giffard*, in those expressions, very correctly described the two questions [628 which have to be decided in this case; and I think the mode in which he expressed himself as to the word "*Eureka*" proves that he did not concur in the opinion which the Vice-Chancellor has given, that because Mr. *Ford* always put his own name before

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the word "*Eureka*," therefore he could not be entitled to the word "*Eureka*" as his trade mark, and that he could have no protection against anybody who used it unless that person also used the name of *Ford*. For the reasons given by the Lord Justices *James*, which I do not repeat, I am clearly of opinion that originally, at any rate, the plaintiff was entitled to be protected against the use of the word "*Eureka*" by the shirt makers as a violation of his trade mark.

Then the question is, has it become *publici juris*? And there is no doubt, I think, that a word which was originally a trade mark, to the exclusive use of which a particular trader, or his successors in trade, may have been entitled, may subsequently become *publici juris*, as in the case which has been cited of *Harvey's sauce*. It was admitted that, although that originally had been the name of a sauce made by a particular individual, it had become *publici juris*, and that all the world were entitled to call the sauce they made *Harvey's sauce* if they pleased. Then what is the test by which a decision is to be arrived at whether a word which was originally a trade mark has become *publici juris*? I think the test must be, whether the use of it by other persons is still calculated to deceive the public, whether it may still have the effect of inducing the public to buy goods not made by the original owner of the trade mark as if they were his goods. If the mark has come to be so public and in such universal use that nobody can be deceived by the use of it, and can be induced from the use of it to believe that he is buying the goods of the original trader, it appears to me, however hard to some extent it may appear on the trader, yet practically, as the right to a trade mark is simply a right to prevent the trader from being cheated by other persons' goods being sold as his goods through the fraudulent use of the trade mark, the right to the trade mark must be gone.

Therefore I have examined the evidence in this case for the purpose of determining whether the use of the word "*Eureka*" has 629] *become *publici juris* in that sense, and I have come to the conclusion upon the whole, that as between the wholesale dealer and the retail dealer it has to this extent become *publici juris*, that by the use of it in the trade circulars, which are issued only to retail dealers, or by the shirts being invoiced by the wholesale dealers "*Eureka Shirts*," no retail dealer would be likely to be deceived or to buy shirts which were not made by *Ford* believing they were *Ford's* shirts. But I have come to the conclusion that a very considerable portion of the public, who buy the shirts for the purpose of wearing them, are still very liable to be deceived by the use of the word "*Eureka*" as a mark on the shirt itself, particularly when it is affixed in the very place

where Mr. *Ford* has been accustomed to place his mark. And the reason why I come to that conclusion is principally this: Mr. *Ford* is the only person who has ever advertised these shirts as "*Eureka*" shirts, and who has ever advertised that he marks them in that particular place. There is evidence that, to a very large extent, indeed for a series of years, Mr. *Ford* has advertised that he marks his shirts in a particular part of them, and that none of them, except those that are marked "*Ford's Eureka Shirts*" are genuine.

Then, no doubt, it is said that he has always put "*Ford's Eureka Shirts*," and that would prevent the public being deceived. I cannot think that that would be its practical effect. It is quite obvious that, although he puts the word "*Ford*" to it for purpose of inducing people to come to him, yet a very large number of persons who read these advertisements would be attracted by and would remember the word "*Eureka*" who would wholly forget the word "*Ford*." And persons who had been accustomed to buy these shirts marked "*Ford's Eureka Shirt*," and persons who had been accustomed to read his advertisement and see that the shirts were extensively advertised as "*Ford's Eureka Shirts*" when they came and saw in a shop, either in this country or in the colonies, marked as the defendant's shirts are marked, "*The Eureka Shirt*," they would not necessarily remember the name of *Ford*, but they would suppose that these were the advertised shirts which had obtained such celebrity. There can be no doubt that there are many persons who, if there were no difference as regards the fit of two shirts, would prefer buying a shirt from the original maker, *and [630 the word "*Eureka*" marked upon a shirt would be calculated to make such persons believe that it was made by the man who originally found out and advertised the "*Eureka*." I am, therefore, of opinion on the first point that the trade mark has not been made so *publici juris* as to debar the plaintiff from maintaining his suit.

Then comes the second question, as to whether he is prevented from having any relief in this Court on account of the misrepresentation he has made, partly, although not very extensively, by public advertisements, and to a very great extent by his bill heads, that this was a patented article, when in truth it is not. Now it becomes necessary on this part of the case to consider first whether an action at law would lie in this case; and secondly, if an action at law would lie, whether the plaintiff ought to have any relief in equity.

In the first place it is quite clear that this is not like the case of *Millington v. Fox* ⁽¹⁾, where the defendant was a totally inno-

(1) 3 My. & Cr., 338.

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cent person, and where no action at law would lie, because the defendant was not guilty of willfully taking the plaintiff's mark. This is a case which is exactly like *Sykes v. Sykes* ⁽¹⁾, which is always cited as to the common law right to maintain actions of this kind, and where it was expressly held, that, although the retailer purchasing the article is not deceived, yet if a trade mark is put upon that article for the purpose of deceiving the persons who purchase from the retail dealer, an action at law will lie. This is, in my opinion, a case of that kind, and it is therefore one in which an action at law *prima facie* could be maintained.

Then would it be a defence to that action at law that the plaintiff has made false representations to the public that his article was patented when in fact it was not? If the false representation was in the trade mark itself, although I cannot find that that point has ever been decided or raised in a Court of Common Law, yet I am disposed to think, and indeed I have a pretty clear opinion, that if that question were raised it would be held that the fact of the trade mark itself containing a false representation to the public would be an answer at law to an action brought for a deceptive use of the trade mark by the defendant. The declaration *at law always begins by setting out that the plaintiff had used for a length of time a certain particular trade mark, and that his goods were known by that trade mark, and it substantially sets up that by the user of that mark, and his goods being known in the market by it, he has practically got a right to the use of that mark. It appears to me that it would come within the rule *Ex turpi causa non oritur actio*; that if the trade mark contains a false representation calculated to deceive the public, a man cannot by using that, which is in itself a fraud, obtain — I do not say an exclusive right — but any right at all. I may observe that *Sykes v. Sykes* ⁽¹⁾ is the only case in which the article was described as a patent article. The word "patent" was in the trade mark: the article was called "*Sykes' Patent*," but in that case there had been originally a patent, and there was no imputation that there was any fraud in the use of the word. All the world might know that the patent had expired. The word was simply used as a description of the article. The same reasoning would apply if the trade was a fraudulent trade. In that case also I have no doubt that no action could be maintained. In *Perry v. Truefitt* ⁽²⁾ and *Padding v. How* ⁽³⁾ there was very good reason for supposing that the trade itself was a fraud. The object of the trader in *Perry v. Truefitt* was to sell under the name of "*Mexican Balm*," some composition which never came from *Mexico*, but which was

(1) 3 B. & C., 541.

(2) 6 Beav., 66.

(3) 8 Sim., 477.

said to be composed from some wonderful herbs to be got only in *Mexico*. So in *Pidding v. How* there was evidence that the object was to persuade the world that the tea which was called "*Howqua's Mixture*" was an extraordinary mixture, made by some great man in *China*, when in point of fact it was made in *England*.

It resembled a case which I remember being tried at *York*, where there was a question respecting the sale of some Peruvian guano, which was proved to be a manufacture made at *Hull*. A number of witnesses stated that everybody in the trade knew that Peruvian guano, unless the words "*Genuine Gibbs*" were added, meant an article made in this country; but they could not deny that when a farmer bought some to put on his fields, he thought he was buying guano from *Peru*. In that case, the sale was held to be a gross fraud, and there is no doubt that no right *could arise out of it. But where the trade is, as in [632 this case, a perfectly honest trade and where the trade mark is, as in this case, a perfectly honest trade mark, I am clearly of opinion that there is no common law principle upon which it is possible to hold that the fact of the plaintiff having been guilty of some collateral fraud would be an answer to an action. It would be impossible to plead at law as a justification for the defendants' committing the fraud that the plaintiff had committed a fraud on some one else. Such a plea would be no answer to the action. It is true that in this case the bills containing this false representation as to its being a patented article are proved to have been given to the defendants themselves; but there is not the slightest evidence or the slightest reason for supposing that the defendants were ever deceived by that representation because they knew perfectly well that there was no patent for these shirts. There would be this further difficulty to be solved: How much misrepresentation must be made to an answer to an action? It is to be said that if the plaintiff had on one single day issued an advertisement containing a false representation, therefore all his rights were gone? I can see no way of determining how far the misrepresentation must extend before it would be considered an answer to an action or a suit.

I am therefore of opinion that an action at law could have been maintained in this case. And we are in the same position now as if, before *Sir John Roll's Act*, which altered the rule of this Court, an injunction had been refused with leave to the plaintiff to bring an action at law, and that action had been tried and a verdict obtained for the plaintiff, and the plaintiff were now before the Court asking for this injunction. Now, is the injunction to be granted or not? It appears to me in this case that the injunction must be granted, unless it can be held

that it is a case in which a Court of Equity would grant an injunction to restrain the plaintiff's action; because it cannot be right, if the plaintiff is allowed to maintain his action, that he should be obliged to bring perpetual actions at law instead of having his injunction in this Court.

The only question therefore remaining is, would a Court of Equity, on account of his false representations restrain the action 633] *at law? I know of no authority for that. On the contrary, in all these cases in which the Court has refused an injunction on the ground of misrepresentation, it has allowed an action at law to be brought if the party chose to bring it. All the authorities tend in that direction, and seem to hold that if an action at law will lie there will be a remedy in this Court by injunction. Indeed I do not see what equitable right the defendant could have to restrain such an action. He is simply a person who has committed a fraud himself, and who has no equitable right whatever, and the only decision which can be cited as an authority is the *Leather Cloth Company v. American Leather Cloth Company* (¹), where, no doubt, Lord Westbury and Lord Kingsdown appear to say that false representations of this kind might be an answer to a suit in equity. But that was plainly a case where the misrepresentation was in the trade mark or label itself, and I have carefully read through the judgments of Lord Kingsdown and Lord Westbury, and it appears to me that they had simply that question before them, and they had not at all present to their minds the question which we have to decide, namely, whether a collateral misrepresentation would be an answer to an action at law; and if it be not an answer to an action at law whether it could be an answer to a suit in equity. I have therefore come to the conclusion, on the second ground also, that it constitutes no reason why the plaintiff should not maintain a suit in this Court.

I entirely agree in what has been said by the Lord Justice that having regard to the fact that the plaintiff has to a certain extent slept on his rights, and having regard to the misrepresentation which he has made, he is not entitled to what is the peculiar remedy of this Court, and which can only be got in equity, namely, an account for the last six years previously to the filing of the bill of the profits made by the sale of shirts by the defendants with his trade mark upon them. If this action had been tried before a jury I am quite confident that upon this evidence he would only have recovered 40s. damages. There is no evidence of specific loss, and therefore a Court of Law would have looked upon it as an action brought to try the right, and the plaintiff would only have recovered nominal damages; and I

(¹) 11 H. L. C., 523.

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think that he *is not, entitled to any account which would [634 enable him to recover sums in equity which he could not have recovered at law.

SIR W. M. JAMES, L.J. :

The form of the injunction will be “ to restrain the defendants from applying the mark or title of ‘*Eureka*’ to any shirts manufactured by them or to any shirts sold by them, unless manufactured by the plaintiffs, and from selling any shirts already marked with the mark and title ‘*Eureka*,’ unless such mark or title has been applied with the sanction of the plaintiff; and from issuing any boxes or packages on which the mark or title of ‘*Eureka*’ shall be applied to shirts not of the plaintiff’s manufacture; and from affixing or using any label or card or other mark containing the word ‘*Eureka*’ to or upon any shirts not of the plaintiff’s manufacture.” That leaves them at liberty to advertise the name as between themselves and the trade; and then there will be an account as prayed in the bill, but limited to the period since the filing of the bill.

Solicitors for the plaintiff: Messrs. *Edmonds & Mayhew*.

Solicitors for the defendants: Messrs. *Phelps & Sidgwick*.

L.JJ. June 22, 1872.

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[660

[Law Reports, 7 Chancery Appeals, 660.]

[1867 H. 238.]

Will—Issue—“Then Living”—Divesting of Vested Gift.

A testator directed his trustees, after the failure of limitations for life and in tail, to sell his real estate and pay a third of the proceeds unto and amongst the children of *A. H.*, deceased, except *J. G. H.*, who should be then living, and the issue of such of them as should be then dead leaving issue, and the issue of *J. G. H.*, except his son *J. W. H.*, share and share alike; the issue of deceased children of *A. H.*, to have no greater share than their parents would have had if living, and the issue of *J. G. H.*, to have no greater share than the issue of any other child of *A. H.* He gave another third upon trust to pay the income to *P. J.*, for life, and after her decease to pay and divide such third share unto and amongst all the children of *P. J.*, who should be “then living,” and the issue of such as should be then dead, such issue to take no greater share than their parents would have had if living. At the end of the will was a proviso that if his estate should ever be sold under the above trust, and the money, or any part of it, become payable to the issue of *A. H.* and *P. J.*, or the issue of *J. G. H.* (except *J. W. H.*), or any of them, and any one or more of such issue should be then dead having left lawful issue, then the issue of such issue as should be so dead should have the share to which their, his, or her parent would have been entitled if living:

Held, that a child of *P. J.*, who survived her, but afterwards died before the period of distribution leaving issue, acquired a vested interest which was not by the final proviso divested in favor of the issue of such child; the word “issue” being held not to apply to children of *P. J.*

THIS was an appeal by children and issue of *William Jupp*, a child of *Philadelphina Jupp*, from so much of an order of Vice-

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Chancellor *Malins* as related to the share of *Philadelphia Jupp* in the testator's estate. The facts will be found fully stated in the *report before the Vice-Chancellor (1), and in the report of a previous appeal as to another share (2).

Mr. *Pearson*, Q.C., and Mr. *H. C. Ward*, for the appellants, relied on the previous decision of the Court of Appeal.

Mr. *Glusse*, Q.C., and Mr. *Charles Hall*, *contrà*.

Mr. *Stallard*.

Mr. *Pearson*, in reply.

SIR W. M. JAMES, L.J. :

I think that the decision of the Vice-Chancellor must be affirmed. The case is not, in my opinion, in any way governed by our decision on the former appeal. We did not on that occasion use the proviso at the end of the will for the purpose of altering the effect of clear words in another part of the will, but for the purpose of explaining something which required explanation, so far as the *Heasman* family were concerned. But by that part of the will which relates to the *Jupp* family, one-third of the testator's estate is clearly given to Mrs. *Jupp* for her life, and at her death to her children then living and the issue of her children then dead. That is a clear gift; the words "then living" having the clear meaning of "living at her death." The word "then" cannot be referred to any other period. That being so, there is a clear vested gift to the children of *Philadelphia Jupp* living at her death, and the issue of such of her children as shall be then dead. Then is there anything which enables us to say that that clear vested gift to her children is divested and given to somebody else? The appellants contend that this is effected by the proviso at the end of the will. [His Lordship read the final proviso (3).] It is said that "issue" includes children, that shares become payable to the children of *Philadelphia Jupp* who survive her, and if any of them die before the period of distribution leaving issue, such issue must take their shares. Mr. *Charles Hall* has called our attention to this, that there was a gift before to persons described as issue who were issue, but not children of *Philadelphia Jupp*, and who took as joint tenants *inter se*, and it is *prima facie* to be supposed *that this clause was intended to apply to them, and was not intended to apply to the share of a child who takes a vested interest as tenant in common. I think that what Mr. *Charles Hall* pointed out is very much strengthened by the concluding words of this proviso, in which the testator says: "And shall receive the part or share to which their, his, or her parent

(1) Law Rep., 11 Eq., 522.

(2) Law Rep., 7 Ch., 275.

(3) Law Rep., 7 Ch., 277.

would have been entitled if living." That is to say, to prevent the family being deprived of the share which would otherwise go over from a joint tenant to his co-tenants, I make a proviso to substitute the issue in that case. That has nothing to do with the case of a person who is provided for and takes an actual interest vested in him at the death of a tenant in life, and his title to which was no sense contingent on his surviving. I am of opinion, therefore, that the decision of the Vice-Chancellor must be affirmed.

SIR G. MELLISH, L.J. :

I am of the same opinion.

Solicitors : Messrs. *E. C. Holmes & Son ; A. S. Edmunds.*

L. JJ. June 22 ; July 6, 1872.

**In re RIDGE'S TRUSTS.*

[665

[Law Reports, 7 Chancery Appeals, 655.]

Will — Construction — Implication — Cross remainders — Issue.

A testator gave his residuary personal estate upon trust to pay the income equally between his three daughters, *F.*, *E.*, and *C.*, during their respective lives ; and if all or any of them should die leaving issue, to pay one-third of the principal amongst the issue of each daughter so dying, in equal shares ; and if only one such daughter should die leaving issue, then in trust to pay and apply the whole residue equally amongst the issue of such one daughter ; but if all the daughters should die without leaving issue, then over. *C.* died leaving issue, and afterwards *F.* died without leaving issue :

Held (reversing the decision of *Wickens*, V.C.), that cross limitations were to be implied between the daughters and their families, and that the issue of each daughter were, for all purposes, to be ascertained at her own death ; and that therefore one moiety of *F.*'s share was payable to the issue of *C.* living at *C.*'s death, and the other moiety went by way of accretion to *E.*'s original share.

THIS was an appeal from an order of Vice-Chancellor *Wickens*.

Charles John Ridge died in 1820, having by will declared the trusts of his residuary personal estate as follows :

" And as to all the remaining interest and dividends of my estate and effects, upon trust to pay and apply the same equally between my daughters by the said *Anne Connor*, viz., *Frances Ridge*, *Eliza Ridge*, and *Caroline Ridge*, and any other daughter or daughters I may hereafter have by the said *Anne Connor*, during their respective natural lives ; and if all, any, or either of them shall depart this life leaving issue, then in trust to pay and apply one equal part, share, or proportion of the principal of my said residuary estate and effects corresponding with the number of my said present and future born daughters, unto and amongst the issue of each of my said present and future born daughters that shall happen to die leaving issue, in equal shares and proportions ; and if only one of such daughters shall die leaving issue, then to pay and apply the whole residue of my

said estate and affects to or equally amongst the issue of such one daughter; but if all such daughters shall die without leaving issue, then I give all the said rest and residue of my said **666]** estate and effects to each *youngest child of every one of my sisters living at the time of such failure of issue of my said daughters, to be divided between such youngest children share and share alike.

The testator left only the three daughters named in the will.

Caroline Ridge married Mr. *Graham*, and died in 1844, leaving four children, all of whom attained twenty-one. One of these children — Mrs. *Livesay* — died in 1868, leaving two children born after Mrs. *Graham's* death.

Frances Ridge died in 1870, having never married. At her death the issue of *Caroline Ridge* were five in number, namely, her three surviving children and Mrs. *Livesay's* two children.

Eliza Ridge was still living, and a spinster upwards of sixty years of age.

On the death of Mrs. *Graham* her one-third share of the estate was divided among her four children. After the death of *Frances Ridge* the trustees made some payments out of her share to the three surviving children of Mrs. *Graham*, and paid the residue into Court under the act for the relief of trustees. Mrs. *Livesay's* two children, who were still infants, then presented a petition claiming two-fifths of Mrs. *Graham's* third share.

Vice-Chancellor *Wickens* directed the fund to be accumulated until the death of *Eliza Ridge* or further order (¹). The petitioners appealed.

667] *Mr. *Freeling*, for the appellants.

The will does not in terms provide for the event which has happened, of one daughter dying without issue, and another dying leaving issue while the third daughter is living; but an immediate gift over is to be implied. The issue of each daughter, who are to take her share, must be ascertained at her own

(¹) 1872, April 30.

SIR JOHN WICKENS, V.C.:

I have read over this will and considered it, and see no reason to doubt that the opinion I intimated yesterday was the correct one — that is to say, that the division will be, in the event which it is supposed will happen, of *Eliza Ridge* dying without issue, among the issue of all generations, the issue generally of *Caroline Ridge*. It is quite clear from the will that the testator knew the difference between "children" and "issue," and there is nothing to enable me to put a restricted construction on the word "issue." "The issue"

must mean either such issue or all the issue. If the former, it means issue living at the daughter's death, which is, of course, an unsatisfactory construction. I think, with reference to an argument addressed to me by Mr. *Casson*, that I can see no trace here of cross limitations, and consequently in the result, which I cannot forecast there may be an intestacy, or there may be a gift to a class yet capable of accretion. Under the circumstances, all I can do is to direct the costs to be paid and the fund to be accumulated until the death of the surviving daughter or further order.

death, and the natural construction is that the same class who take one share take the others if they go over.

Mr. *Martineau*, for the surviving children of Mrs. *Graham* and the husband of Mrs. *Livesay*.

Mr. *Cusson* for the trustees:

If only one daughter leaves issue, her issue takes the whole fund. If none leave issue, the fund goes over. There is no express provision to meet the case of two daughters leaving issue. In such a case intestacy cannot have been intended, so cross limitations ought to be implied: *Re Clarke* ⁽¹⁾: *Vanderplank v. King* ⁽²⁾.

Mr. *Freeling*, in reply.

July 6. SIR W. M. JAMES, L.J.:

The question in this case depends on the construction of a will, the material parts of which are very short. They run thus: [His Lordship here read so much of the will as is set out above.]

Now it is obvious that this is not a complete testamentary disposition. It is a mere sketch of a will, and the question is whether we can fill in that sketch and supply the obvious gaps in it by judicial implication. The testator has not provided for the case of two daughters leaving issue, and he has not provided for this, which might happen, viz., that one of the three daughters might die immediately after his death a spinster leaving the other two daughters spinsters who might not marry for a number of years. It is obvious therefore that the testator has not made a complete disposition. If this had been a gift of real estate [668 to the three daughters and the heirs of their bodies as tenants in common in tail, and a gift over in the event of all of them dying without issue, it would have been the common ordinary case in which cross remainders in tail would have been implied. If, again, the will had run thus: "I give the gift to the three, and on their death to their respective children, and if any of them should die without children, then to the survivor of survivors, and if all should die without children, then over," that would have been a case in which "survivors" would have been construed "others."

Now I am of opinion that this case falls entirely within those principles. It is a case in which we are authorized and bound to fill in the will, and to supply the gaps by judicial implication of the testator's meaning. The testator obviously intended that the objects of his bounty were to be his daughters' families if they should have any. He intended that the property should be enjoyed by them and not go over to anybody else as long as any of the daughters or their families survived; and the only

⁽¹⁾ 11 W. R., 871.

⁽²⁾ 3 Hare, 1.

mode in which that general intent of the testator can be effectuated so that the property shall be secured to the daughters and their issue, and not go over till the issue of all the daughters fail, is by supplying, not cross remainders in tail, since the subject matter is not real estate, but cross limitations between the daughters and their families. Indeed, this will lends itself to that more readily than most wills in which implication has been introduced, for the Court is not striking out a single word; it is not contradicting anything in the will, but it is giving to every sentence its plain, grammatical, and ordinary meaning. If any of the events provided for happen, then the will takes effect according to its letter. The implication only applies to events for which the the testator has not in terms provided, but as to which no person applying merely common sense to the will can have any doubt what he intended.

Then with regard to one of the points raised by the Vice-Chancellor, we are of opinion that the class of issue must not be in every case ascertained at the death of the daughter leaving issue surviving. To hold that the class of issue of any daughter is in any case to remain in suspense until some other daughter dies would contravene the cardinal rule of construction 669] tion which this Court has *always adopted for reasons of family convenience and public policy, viz., that interests are to be vested as soon as they can be consistently with what the testator has said. In truth, if we were to read this will otherwise, and say that the issue of *A* are to be ascertained, not at *A*'s death, but at the death of *B* or *C*, or of *B* and *C*, that would be to contradict the last gift in the will, which is, "to pay and apply the whole residue of my said estate and effects to or equally amongst the issue of such one daughter." Under this gift, if the daughter dies leaving issue and the other two afterwards die without issue, the issue of the first daughter take the whole fund; but if they are ascertained at the death of the survivor it must be held that the interests which the class of issue ascertained at the first daughter's death take in her share are liable to be divested so as to let in other issue, a construction which the Court would not readily be induced to adopt. The result will be that with regard to the share now left vacant by the death of one daughter, one moiety will be given to the issue who take their parents' share, i.e. to the four children of Mrs. *Graham*, and the other moiety will go by way of accretion to the share of which the surviving daughter is tenant for life, and at her death it will go to her issue, if any, and if none, to the children of Mrs. *Graham*.

SIR G. MELLISH, L.J., concurred.

Solicitors for all parties: Messrs. *Cunliffe & Beaumont*.

L.JJ. July 11, 12, 1872.

*MEINERTZEN V. WALTERS.

[670]

[Law Reports, 7.Chancery Appeals, 670.]

1870 M. 152.

Will — Ademption — Advances to Children — Double Portions — Residue — Widow and Children.

A testator directed his trustees to pay the income of one moiety of his residuary estate to his widow during her life, and to divide the other moiety between his children in equal shares, as tenants in common.

Advances were made by the testator to some of his children after the date of his will:

Held, (affirming the decision of *Bacon*, V.C.), that the advances could only be brought into account for the benefit of the children among themselves, and that the widow was not entitled to have her income increased by having the advances brought into account in estimating the residue.

Montefiore v. Guedalla ⁽¹⁾ distinguished.

THIS was an appeal from a decision of Vice-Chancellor *Bacon*.

Daniel Meinertzen, by his will, dated the 15th of January, 1859, devised and bequeathed all the residue of his real and personal estate and effects to *G. S. Walters*, *A. Castellain*, and *Johannes Tideman*, thereafter appointed executors of his will upon trusts for conversion and investment, and upon further trust that they should, so long as his wife *Amelia* should continue his widow and unmarried, pay the annual produce of one equal half part of the said trust moneys unto her for her own absolute use and benefit, with a reduction in the event of her second marriage, and as to the other moiety of the said trust moneys and securities, and the dividends, proceeds, and annual produce thereof, from and immediately after his death, in trust for all and every his children who being sons should attain twenty-one or being daughters should attain that age or marry, with consent as therein specified, to be divided between them in equal shares as tenants in common.

The testator died on the 12th of July, 1869, leaving his widow and seven children surviving. Of these children one, *Johanna*, was married to the defendant *Alers Hankey* in October, 1859, and another, *Hermine*, to the defendant *Thomas Hughes Jackson* in June, 1862. Two of the others were still infants. Settlements were *executed upon the marriage of Mrs. *Hankey* and Mrs. *Jackson*, and further transfers of property were made to the trustees of their settlements by the testator.

Independently of these settlements, various sums were alleged to have been advanced by testator to his children, and gifts made to his wife, during his lifetime and after the date of his will.

A bill having been filed by the widow for administration of

(¹) 1 D. F. & J., 93.

the estate, one of the questions which arose upon further consideration was, whether the moneys advanced or settled by the testator in his lifetime, after the date of his will, to or upon his children, were to be taken into account as part of their respective shares in the residuary estate of the testator, so that the widow would be entitled to one moiety of the income of the residuary estate as increased by the sums advanced to the children, or whether she was only entitled to the income of one moiety of the actual residue unaugmented by the advances.

The Vice-Chancellor was of opinion that the plaintiff was not entitled to have her income increased by having the advances brought into hotchpot, and from this decision the plaintiff appealed.

Mr. *Eddis*, Q.C., and Mr. *Vaughan Hawkins*, for the appellant:

The advances made by the testator to the children in his lifetime were ademption *pro tanto* of their shares in the residue, and they ought to be brought into hotchpot before the residue is divided. We admit that there is no case exactly in point; but we are not seeking to extend the doctrine of ademption by advancement; what we claim is a legitimate deduction from the principle. That doctrine applies equally to the share of a residue as to a legacy of fixed amount, although at first there was some doubt upon the subject. It is now well established by *Montefiore v. Guedalla* ⁽¹⁾. In the case of an ordinary legacy to a child being adeemed, all the residuary legatees take the benefit of the ademption whether children or strangers: *Kirk v. Eddowes* ⁽²⁾. Why should not the same result follow from a share of the residue being adeemed? The basis of the rule is the moral obligation which is supposed to exist that a father [672] should provide for all his children *equally; and the law, so to speak, interpolates into the will the intention to satisfy this obligation; and then, if the testator makes an advance in his lifetime, it is like paying off part of a debt, which must necessarily operate to swell the residue, whether given to children or to a stranger: *Thynne v. Earl of Glengall* ⁽³⁾; *Trimmer v. Bayne* ⁽⁴⁾; *Hinchcliffe v. Hinchcliffe* ⁽⁵⁾; *Beckton v. Barton* ⁽⁶⁾; *Dawson v. Dawson* ⁽⁷⁾.

It is said on the other side that the provisions as to hotchpot contained in the *Statute of Distributions* have never been extended so as to operate between the widow and the children of an intestate; but that rests upon special enactment, nor can any inference from the law in case of an intestacy be applied to the division of the residue under a will: *Smith v. Strong* ⁽⁸⁾.

⁽¹⁾ 1 D. F. & J., 98.

⁽²⁾ 8 Hare, 509.

⁽³⁾ 2 H. L. C., 131.

⁽⁴⁾ 7 Ves., 508.

⁽⁵⁾ 3 Ibid., 516.

⁽⁶⁾ 27 Bear., 99.

⁽⁷⁾ Law Rep. 4 Eq., 504.

⁽⁸⁾ 4 Bro. C. C., 493.

Mr. *Amphlett*, Q.C., Mr. *C. Holl*, Mr. *Cracknall*, and Mr. *Latham*, for the defendants, the children of the testator, were not called on.

SIR W. M. JAMES, L.J.:

The contention of the appellant in this case is so shocking to my common sense and to my sense of justice that I am glad to find that there is no foundation in the authorities for holding that the law of *England* is subject to that opprobrium which, if the law were as alleged, it would be justly subject to in the eyes of the civilized world.

The contention of the appellant is, that if a father leaves his residue between a child and a stranger, and then makes a large advance to the child and also a large advance to the stranger, there being nothing more but the will and those advances, the law of *England* is this, that the child is obliged to bring what he has received into the residue, and that the stranger is not to bring in what he has received, but is to have it enlarged by that which has been given to the child.

The origin of the rule as applied to legacies is this — that where a father makes a provision for his children, leaving them legacies, and afterwards gives a portion to one of those children, it is *supposed, from what is known to be the ordinary [673] intention of testators, that he did not intend to make any real difference between his children, and that the child advanced in his lifetime takes the advance *pro tanto* by way of ademption. No doubt that has been necessarily applied to the advantage of residuary legatees, because, where the legacy fails, or is satisfied, or is adeemed, from the very nature of the case the residuary legatee who takes his chance gets the benefit of that, as he would the burden of any diminution. That is the state of the law with regard to legacies. It is true the rule was applied to a share in a residue in the case of *Montefiore v. Guedalla* ⁽¹⁾, which was a case in which I observe that the Lord Justice *Knight Bruce* expressed great doubt as to the law, but he was satisfied in concurring in the decision, because the common sense of the thing was in favor of the decision in that particular case. But what was done in *Montefiore v. Guedalla*, in my view of it, was not an application of any such view as is here contended for, but was an application of the general principle which was supposed to underlie the rule, and of which the rule was only an application and an illustration. The principle is that it must be presumed that a father intends equality between the children; and if he leaves the residue to the children, and afterwards makes an advance to one of the children, the general rule is that such advance must be brought into hotchpot, so that the disposition of

(1) 1 D. F. & J., 93.

his fortune, by which he intended to produce equality among the children, may not be altered, Whether, following out the rule logically, it might be applied to such a case as that before us, I do not think it necessary to consider; for I am satisfied of this, that if the logical carrying out of the rule there acted upon would lead to such a result as is involved in the contention of the appellant, the sooner that case is overruled by the House of Lords the better. It seems to me monstrous that the widow, who may have received, and in the present case has received, advances as well as the children, is to be benefited by advances made to the children, and that she herself is under no obligation whatever to bring in advances which have been made to her. That would equally apply to a stranger as a widow, and I am of opinion that there is nothing in the law or in the authorities [674] which compels me to come to a *decision which, to my mind, would be contrary to common sense and common justice. I concur, therefore, in the opinion of the Vice-Chancellor.

SIR G. MELLISH, L.J. :

I am of the same opinion. It is admitted that there is no express authority upon the question which is now before us; and indeed it seems clear that prior to the case of *Montefiore v. Guedalla* ⁽¹⁾ there was no authority that the rule as to double portions was to be applied to residue; but the rule as to double portions having to a certain extent been applied to gifts of residue in that case, we are now to determine whether that is to be carried so far as that every stranger who has interest in the residue, whether it be an interest for life or an interest in the capital of the residue, is to have the benefit of the application of the rule.

Now, in the ordinary case of a legacy, where a legacy has been left to a child, and then a gift has been made which amounts to an ademption of that legacy, there certainly appears to be no possible way of holding it to be an ademption so as to carry out the general rule against double portions, except by holding that whoever has the residue benefits by it; because by the necessity of the case the persons who have the residue must benefit by the fact of the previous legacy not being paid from any cause whatever. But when we come to apply the rule as to a share of residue, appears to me that it is perfectly easy to carry out what I consider the real principle of the rule, namely, equality between the children, without allowing the stranger to take any benefit. It appears to me, therefore, that if the rule is to be applied to a share of residue it is to be applied simply to such an extent as may be necessary to carry out the principle that a testator who has divided his residue among his children, either equally or in any other proportion, does not intend to

⁽¹⁾ 1 D. F. & J. 93.

alter that equality or proportion by making a subsequent gift to a particular child. I think there is great good sense in what was said by Lord *Hardwicke* in *Furnham v. Phillips* ⁽¹⁾, and Lord *Rosslyn* in *Freemantle v. Bunks* ⁽²⁾, that it is very difficult to conclude from a gift of residue, which in its very nature is uncertain, that a testator has fixed upon a particular *sum which [675 he thinks is a proper portion for his child, in the same way as you may do in the case of a legacy where he leaves a child a specific sum, as for instance £10,000. In that case you may consider that the father had in his own mind that £10,000 is a sufficient portion for that child, and when he subsequently gives a sum of £5000 to that child it is considered that he has not altered his mind as to the £10,000 being a sufficient portion. But it is difficult to assume from a mere gift of residue to a child that the father has come to a fixed determination as to what sum shall be sufficient for his fortune. Still you may imply this, that if he divides his residue equally among his children, he does not intend to prefer one child above the other. If from any special circumstances, from one child marrying or any other cause, he makes a gift to that child in his lifetime, the law, according to the rule acted upon in *Montefiore v. Guedalla* ⁽³⁾, which I agree with Lord Justice *Knight Bruce* was good sense as applied to that case, is, that you are not to assume that the testator in making that gift showed any alteration of his intention as respects the equality of the children. If the rule is that we are to carry out what the testator intends, it is clear that when he makes a gift in his lifetime, as in this case, he does intend to take away from the residue which he had given to the stranger. It cannot possibly be disputed that if the testator had given to his widow a life interest in the whole of the residue, the fact of making a gift in his lifetime to a child, just as to anybody else, must have had the effect of diminishing that residue; and it certainly appears to me contrary to reason to hold that if, instead of having given his wife a life interest in the whole residue, he gives her a life interest in the half, and then makes presents to children, she is in that case to have a life interest in that which he meant the child to enjoy immediately. It appears to me, therefore, that the decision of the Vice-Chancellor is in accordance with good sense, and not inconsistent with the authorities, and that the appeal must be dismissed.

Solicitors for the Plaintiff: Messrs. *Freshfield*.

Solicitors for the Defendants: Messrs. *Gregory, Rowcliffes, & Rawle*; Messrs. *Kimber & Ellis*.

⁽¹⁾ 2 Atk., 215.

⁽²⁾ 5 Ves., 79, 85.

⁽³⁾ 1 D. F. & J., 98.

L. JJ July 15, 19, 1872.

*HIGGINBOTHAM v. HAWKINS.

[Law Reports, 7 Chancery Appeals, 676.]

1870 H. 239.

Waste—Deceased Tenant for Life—Injunction—Account—Statute of Limitations.

A tenant for life was executrix of a preceding tenant for life, both being impeachable for waste, and both having committed waste by cutting timber :

Held, that the *Statute of Limitations* began to run against the remaindermen in fee from the time when the timber was cut, and not from the time of the death of the tenant for life :

Held, that though an injunction and an account were granted against the existing tenant for life, yet as no injunction could be granted against the preceding tenant for life, no account could be granted against her executrix for waste committed by the preceding tenant for life.

Decree of *Bacon*, V.C., varied.

MARY HIGGINBOTHAM, by her will, devised certain lands at *Alresford*, in the county of *Essex*, to the use of *Harriet Higginbotham* and her assigns during her life without impeachment of waste except voluntary waste in cutting down any timber other than such timber as might be required for the repairing of the buildings; with remainder as to one moiety to the use of *Elizabeth Jones* and her assigns during her life without impeachment of waste except as aforesaid, with remainder to the use of *G. Higginbotham* and *W. Higginbotham* as tenants in common in fee; and as to the other moiety to the use of trustees during the life of *Ann Becket* without impeachment of waste except as aforesaid; with remainder to the use of the eldest daughter of *Ann Becket* in fee.

Mary Higginbotham died in 1856, and *Harriet Higginbotham*, the first tenant for life, died in September, 1865, leaving as her executrix *Elizabeth Jones*, who was the second tenant for life of one moiety.

On the 27th of August, 1870, *G. Higginbotham* and *W. Higginbotham*, the remaindermen in fee of one moiety, filed their original bill against *Elizabeth Jones*, as tenant for life of one moiety, and the other persons interested in the estate, alleging that trees 677] had *been felled and sold by *Elizabeth Jones* and the trustees of *Ann Becket*, and that other acts of waste were threatened, and praying for an injunction, and for an account of timber cut.

On the 2d of March, 1871, the plaintiffs amended their bill introducing charges against *Elizabeth Jones*, as executrix, in respect of timber cut in the lifetime of *Harriet Higginbotham*, and praying further that an account might be taken of what had come to the hands of *Harriet Higginbotham*, and of *Elizabeth Jones* as well as executrix of *Harriet Higginbotham* as in her own right and for payment of what might be so found due to the plaintiffs.

Several defences were made to this suit, the defendants contending that no waste according to the will had been committed; and *Elizabeth Jones* contending that there was no right in equity against her as executrix of *Harriet Higginbotham*; and that if there was, still any claim against the estate of *Harriet Higginbotham* was barred by the *Statute of Limitations*, no timber having been shown to have been cut in her lifetime within six years of the bill being amended as against her representative, and, moreover, it being shown that the remaindermen were at the time aware that the timber was cut, and complained about it.

The Vice-Chancellor *Bacon* was of opinion that waste had been committed, and granted an injunction and an account of all timber cut since the death of the testator ⁽¹⁾.

Elizabeth Jones appealed.

*Mr. *Fischer*. Q.C., and Mr. *Key*, for the appellant: [678

The right of the reversioner to recover the value of timber cut is a legal right, and has in this case been barred by the lapse of time, which began to run, not from the death of the tenant for life, but from the cutting of the timber: *Garth v. Cotton* ⁽²⁾; *Gent v. Harrison* ⁽³⁾. At all events the plaintiffs have no remedy

⁽¹⁾ 1872. March 19.

SIR JAMES BACON, V.C., said he had no doubt that the plaintiffs were entitled to a decree as the case of waste had been made out. His honor then said:

Now it has been argued that there can be no remedy against the estate of the late *Harriet Higginbotham*, and the *Statute of Limitations* has been relied upon as an answer to the plaintiffs' claim in that and in other respects. *Harriet Higginbotham* died less than six years before the filing of the bill; the statute, therefore, in no sense could be an objection to the claim which is made against her estate, the charge being that she, while she was tenant for life, had despoiled the estate by converting a part of the inheritance to her own use, and so much therefore her estate is liable to make good to the persons interested in the inheritance. As to that I have not heard any answer, except that it was suggested by Mr. *Fischer* that *Gent v. Harrison* (Joh., 517), was an authority to show that the remedy, if any, was a remedy at law, and that there could be no claim made in this Court upon any equitable grounds. Now the case of *Gent v. Harrison* is by no means an authority for that proposition. In that case the tenant who had come into possession of the estate complained that,

by the wrongful act of the former tenant for life, the estate had been invested, that the proceeds of the investment had been received by the then tenant for life, and that the money so received was the plaintiff's. The answer to that was that he might bring an action for money had and received. How could the plaintiffs here bring any such action? They have no right to the income of any fund, for the timber has been taken from the estate; nor is there any analogy that I can see between *Gent v. Harrison* and the present case. I am of opinion that the estate of *Harriet Higginbotham* is liable for all that she had done in her lifetime by means of the wrongful cutting, selling and dealing with the timber.

His honor then said that the plaintiffs were entitled to an account of all the timber cut. If the defendant had any case for allowance to be made to her for what she had done to the benefit of the estate, she could show that on the inquiry. It was said that the amount of timber cut was very small, and ought not to have been the subject of a suit. But that did not at present appear, and the case must come on again for further consideration.

⁽²⁾ 1 Wh. & T. L. C., 3d Ed., 623, 660.

⁽³⁾ Joh., 517.

in equity against the estate of *Harriet Higginbotham*; the only equity in these cases is the right to an injunction to which the right to an account is attached, and that fails when the tenant for life is dead: *Jesus College v. Bloome* ⁽¹⁾; *Seagram v. Knight* ⁽²⁾. No doubt the present tenant for life is also the executrix of the deceased tenant, but that is an accident.

THEIR LORDSHIPS were of opinion that waste had been committed and only called upon the respondents as to the waste committed during the life of the former tenant for life.

Mr. *Eldis*, Q.C., and Mr. *Marten*, for the plaintiffs:

We have a right to follow the money into any hands in which we may find it, and to restore that which has been taken from the estate. *Elizabeth Jones* is properly brought before the Court, 679] and *must account. In *Duke of Leeds v. Earl Amherst* ⁽³⁾ the right was held to have accrued at the death of the tenant for life.

Mr. *Kay*, Q.C., Mr. *Rodwell*, and Mr. *Field*, for other defendants.

SIR W. M. JAMES, L.J.:

In this case the bill was filed by the reversioners under a will, and prayed for an injunction and for an account of timber felled. The injunction was granted, as it appeared that there was legal waste committed by felling trees beyond what was authorized by the will. But what was principally argued before us was with respect to the timber cut during the lifetime of the preceding tenant for life.

Now the mere fact that the present tenant for life was also the executrix cannot make any difference; and to so much of the suit as seeks an account of what was received by the preceding tenant for life there appear to be two answers. In the first place, it is clearly established that a bill will not lie for an account of timber felled any more than for any other money demand, except when the account is asked as incident to an injunction, and that where the plaintiff has no right to an injunction, he has no right to an account, and his remedy is at law alone. In this case the account prayed against the estate of the deceased tenant for life is not incident to the injunction against the present tenant for life.

The second answer is, that the claim is barred by the statute. Beyond all question it appears that there was an immediate right of action. Legal waste had been committed, and the right of action accrued when the wrong was committed, at which time the reversioners might have brought their action for money had and received.

⁽¹⁾ 3 Atk., 262.

⁽²⁾ Law Rep., 2 Ch., 628.

⁽³⁾ 2 Ph., 117.

Therefore, in my opinion, the bill has entirely failed so far as regards the account against the estate of *Harriet Higginbotham* or her executrix in regard to what was done in her lifetime.

As to what was received by Miss *Jones* after the death of *Harriet Higginbotham*, she is answerable, and she appears to have received all the money. The plaintiffs are entitled to half of what Miss *Jone* had so received, and the other half belongs to the *family of Mrs. *Becket*. The sums are very small, and the [680 Lord Justice and I are of opinion that we have materials enough to fix the amounts without putting the parties to any further expense. [His Lordship then stated the amounts.] As the suit has partially failed, there will be no costs.

SIR G. MELLISH, L.J., concurred.

Solicitors: Messrs. *Bell, Brodwick, & Gray*; Mr. *J. B. Towe*; Messrs. *Field, Roscoe, & Francis*.

L. JJ. July 20, 1872

***ROBEY & CO.'S PERSEVERANCE IRONWORKS V. OLLIER.**

[Law Reports, 7 Chancery Appeals, 695.]

1870 R. 148.

Lien — Equitable Assignment — Bill of Exchange drawn against Cargo.

B consigned to the defendants by the ship *Acacia* a cargo which had been purchased at the joint risk of himself and the defendants, and advised them of the particulars of bills which he had drawn against the cargo payable to his own order. The defendants replied, promising to protect the bills. *B* indorsed to the plaintiffs three of these bills, which ran, "Pay to the order of myself the sum of £ sterling, which place to account cargo per *A*." *B*, having stopped payment, the defendants refused to accept the bills; but after selling the cargo, offered to pay to the plaintiffs the surplus of the proceeds, after satisfying a balance due to them from *B* on the general account between them. The plaintiffs refused to accept this, and filed their bill, claiming a lien for the full amount of the three bills:

Held (affirming the decision of the master of the rolls), that the plaintiffs had no lien on the proceeds of the cargo.

Frith v. Forbes (*) discussed.

THIS was an appeal by the plaintiffs from an order of the master of the rolls dismissing their bill, which was filed to establish a lien on the proceeds of a certain cargo.

In November, 1869, *F. C. Brown*, of *Ibraila*, in the *Danubian Principalities*, consigned to the defendants a cargo of maize by the ship *Acacia*, and on the 9th of November sent to them a letter of that date, which, after stating that the bill of lading was inclosed *and that the invoice would be sent by the next post, proceeded as follows:

(*) 4 D. G. & J., 409.

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"Against this cargo I beg to advise having drawn to account on your good selves as follows, under this day's date :

No. 779	.	.	£200	} 3 m. date order myself.
780	.	.	230	
781	.	.	240	
782	.	.	250	
783	.	.	280	
784	.	.	300	

£1500

which please protect on presentation."

The bill of lading was not inclosed in this letter, but was sent to *Ollier & Co.* in another letter of the same date. The letter set out above was received by *Ollier & Co.* before the arrival of the bill of lading, and on the 15th of November they wrote to *Brown* as follows :

"Your next will doubtless hand us bill of lading for the maize, as it was not included in your last. We confirm remarks in our last on the subject of the sale, and you may rely on our doing our best, and keeping a sharp look out about the weight, which we always find it necessary to do. You drafts on account of this cargo shall have due protection."

On the 19th of November, 1869, the defendants having received the bill of lading, sent to *Brown* a letter, which was in part as follows :

"We confirm our last of 15th instant, and have yours of 9th will bag of lading, per *Acacia*, for 1350 quarters maize, and we await your next with invoice. Noting all you say about weight and days, which shall have our best attention. Your six drafts against this cargo, £1500 total, shall be duly honored."

After receiving this letter, *Brown*, who was indebted to the plaintiffs on account current, indorsed the last three bills, 782, 783, 784, to the plaintiffs, and sent them to the plaintiff inclosed in the following letter.

697] *"I beg to inclose herewith three drafts for

£250	} Order myself on Messrs. <i>Ollier & Co.</i> , of <i>London</i> at
280	
300	

3 m. date from 9th inst.

£830

sterling, which at maturity please pass to my credit."

The bills were in the following form :

"First.

"*Ibraila*, Nov. 9, 1869. Exchange for £250 sterling. At three

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months date of this, first of exchange; second and third not paid, pay to the order of myself the sum of £250 sterling value, which place the account cargo per *A.*, as advised by this day's post.
"Fredk C. Brown."

"To Messrs. Ollier & Co.

"No. 782."

The indorsement on each was

"Pay to the order of Messrs. Robey & Co., Limited, value received.
Ibraila, Nov. 23, 1869.
Fred C. Brown."

On the 6th of December, 1869, the plaintiffs received the drafts, and forwarded them to the defendants, who returned them unaccepted, *Brown* having in the meantime stopped payment.

The defendants having received and sold the cargo, the plaintiffs filed their bill to establish a lien on the proceeds for the amount of the three drafts held by them.

Brown up to his stoppage had acted as agent at *Ibraila* for the defendants, and he and the defendants occasionally undertook speculations at their joint risk, though there was no general partnership between them. The purchase of the cargo of the *Acacia* was one of these joint speculations. The ordinary course of business was, that *Brown* consigned cargoes to the defendants, and drew bills upon the defendants against such cargoes. The defendants kept a general account current with *Brown*, in which they debited him with the drafts drawn by him, and accepted by them, and credited him with the invoice price of the cargoes on their arrival; and when the purchase was at their joint risk he was *credited with his share of profit or loss after the [698 cargo had been sold. All consignments, whether on joint risk or not, were passed through this account current.

On the 3d of November, 1869, the balance of this account was slightly against *Brown*, and several transactions at their joint risk were then pending. The defendants alleged that on the account being balanced at the end of 1869, after these transactions had been wound up, the sum of £138 13s. 8d. only was due to *Brown*. This sum the defendants before suit offered to pay to the plaintiffs, who refused to accept it, and claimed the full amount of the three bills.

The Master of the Rolls dismissed the plaintiffs' bill with costs, and from this order the plaintiffs now appealed.

Sir *R. Baggallay*, Q.C., and Mr. *Sped.* for the appellants, relied on *Frith v. Forbes* ⁽¹⁾ as governing the present case.

Mr. *Southgate*, Q.C., and Mr. *Miller*, Q.C., for the respondents.
 SIR W. M. JAMES, L.J. :

I am not prepared to say that merely because a bill of exchange

(1) 4 D. F. & J., 409.

purports to be drawn against a particular cargo it carries a lien on that cargo into the hands of every holder of the bill. In *Frith v. Forbes* there were grounds for saying that the intention was to give *Frith, Sands, & Co.* an equitable interest in the cargo, for the letters of the consignor to the consignees referred to bills of exchange which the consignor had drawn in favor of *Frith, Sands, & Co.* Here the reference is only to bills which the consignor had drawn to his own order, not mentioning any third parties. In *Frith v. Forbes* the cargo was the property of the consignor, who had full right to dispose of the proceeds as he pleased; here *Brown* was not the owner of the cargo but had only a joint interest in it. Moreover, his letters to the defendants were not communicated to the plaintiffs, who did not advance their money on the faith of them. I am of opinion, therefore, that the plaintiffs have no such lien as they claim, and that their bill was rightly dismissed. The decision in *Frith v. Forbes* turned upon special circumstances, and can hardly be treated as governing any other case.

Sir G. MELLISH, L.J. :

I am of the same opinion. The indorsement of a bill gives only a right to the bill, and I do not think that any mercantile man would suppose, because he saw in the bill the words "which place to account cargo per A," that he was to have a lien on that cargo. A mercantile man who is intended to have a lien on a cargo expects to have the bill of lading annexed; if there is no bill of lading annexed he only expects to get the security of the bill itself. In *Frith v. Forbes* ⁽¹⁾ the Court considered that, taking all the letters together, there was an equitable assignment. Here *Brown* had no right to make an equitable assignment, and did not, in my opinion, purport to make one.

Solicitors: Messrs. *Stoken & Jupp*; Messrs. *Taylor, Honre, & Taylor*.

(¹) 1 D. F. & J., 409.

L.JJ., July 12, 13, 15, 16, 17, 22, 1872.

HEXT V. GILL.

[Law Reports, 7 Chancery Appeals, 699.]

1869 H., 16.

Mines and Minerals — China Clay — Reservation — Rights of Mine Owners — Enfranchisement — Misdescription — Injunction — "Threaten and Intend."

In 1799 the Duke of Cornwall, as lord of a manor, granted the freehold in a copyhold tenement to the copyholder, reserving "all mines and minerals within and under the premises with full and free liberty of ingress, egress, and regress, to dig and search for and to take, use, and work the said excepted mines and minerals," the deed not containing any provision for compensation. Under the tenement was a bed of china clay, the existence of which did not appear to have

been contemplated by either party at the time, no china clay having ever been gotten out of the lands of the duchy, though the existence of tin was well known. It was admitted in the cause that china clay could not be gotten without totally destroying the surface, and the process of getting tin by "streaming," which was an ancient, and at the time of the grant the most usual, mode of getting tin, was almost equally destructive. A bill by the owner of the surface to restrain the owner of the minerals from getting china clay having been dismissed by *Wickens*, V.C., on the ground that the reservation included china clay with the power to get it:

Held, on appeal, that the china clay was included in the reservation, but that the surface owners was entitled to an injunction to restrain the owner of the minerals from getting it in such a way as to destroy or seriously injure [700 the surface.

When a landowner sells the surface, reserving to himself the minerals with power to get them, he must, if he intends to have power to get them in a way which will destroy the surface, frame the reservation in such a way as to show clearly that he is intended to have that power.

The deed granted the property by the description of "All that copyhold tenement called *Greys*, consisting of a house with divers parcels of land, containing 103 acres (that is to say)" then followed parcels, concluding with "a parcel of land running with *G. Moor*, containing twenty-seven acres, which said tenement, called *Greys*, is now held for the life of *G. H.* by copy of Court roll:"

Held, that on the construction of this grant, a piece of uninclosed land containing twenty-seven acres, and forming part of the waste of the manor, and proved never to have been a part of the copyhold tenement, did not pass, although there was nothing else to answer the twenty-seven acres mentioned in the deed, and the 103 acres could not be made up without it.

The defendants *G.* and *L.*, who were entitled to the minerals under *Greys* had granted a lease to their co-defendants of the china clay under various lands, including great part of *Greys*. The lessees had entered *Greys* for the purpose of getting of china clay, but had not got any, and long before the bill was filed had ceased to occupy any part of the estate, and were getting clay only from the twenty-seven acres of which the plaintiffs claimed to be owners, but to which they were decided not to be entitled. The defendants by their answers stated that they had no intention of getting clay at present out of *Greys*, but they insisted that they were entitled to do so:

Held, that the defendants "threatened" to get the clay so as to give the Court jurisdiction to interfere by injunction.

THIS was an appeal by the plaintiffs from a decree of Vice-Chancellor *Wickens* dismissing the bill.

By deed or certificate of contract dated the 4th of January, 1799, under the hand of the surveyor general for the Duchy of *Cornwall*, and executed in accordance with the acts for the redemption of land tax, the then Duke of *Cornwall*, as lord of the manor of *Treverbyn Courtenay*, conveyed to *Charles Rasleigh* the fee simple and inheritance of "All that customary or copyhold tenement, called *Greys*, with the appurtenances, parcel of the before mentioned manor of *Treverbyn Courtenay*, consisting of a house, garden, farm yard, mowhay and offices, containing by admeasurement 3R. 33P., with divers closes and parcels of ground, containing also by admeasurement 103A. 1R. 30P., or thereabouts (that is to say)" [here followed parcels, concluding with] "and a parcel of land running with *Gurka Moor*, containing 27A. 2R., which said *tenement called *Greys* is now held for the life [701 of *John Hext*, gentlemen, under the yearly rent of 15s. 3d., by

copy of court roll bearing date the 20th of September, 1771, together with all timber trees, and other trees, waters, water-courses, roads, ways, easements, commodities, profits, privileges, emoluments, and advantages whatsoever to the said several and respective premises belonging or appertaining." The deed contained the following exception and reservation :

"Excepting nevertheless and always reserving unto his said Royal Highness the Prince of *Wales*, his heirs and successors, Dukes of *Cornwall*, all mines and minerals within and under the said several and respective premises, or any part thereof, together with full and free liberty of ingress, egress, and regress to and for his said Royal Highness, his heirs and successors, and his and their officers, agents, and workmen, and to and for the lessee or lessees of his said Royal Highness, his heirs and successors, and the agents and workmen of such lessee and lessees, into and out of the said several premises and every part thereof, with or without horses, carts, and carriages, to dig and search for, and to take, use, and work the said excepted mines and minerals."

In the next month *Rushleigh* conveyed the above premises to *Samuel Hext* (who was entitled to the copyhold interest in the property), his heirs and assigns. The plaintiffs were the successors in title of *Samuel Hext*.

The plaintiffs alleged that a certain part of *Garka Moor*, which was not inclosed, but was distinguished by certain landmarks, was the 27A. 2R. mentioned in the conveyance. This was distinguished in the bill as "the uninclosed part of the *Greys* estate." Under this land, as well as under the inclosures of the *Greys* estate, was a bed of china clay. The defendants *Gill* and *Leimey*, who had become entitled to the mines and minerals comprised in the above reservation, had granted in 1868 a lease to the defendants, *Derry* and *Scott*, of the china clay under certain lands, including the twenty-seven acres and the greater part of the *Greys* estate. Under this lease *Derry* and *Scott* got a quantity of china clay from under that part of the moor which the plaintiffs claimed as the uninclosed part of the *Greys* estate; and on one occasion, more than a year before the filing of the bill, 702] they entered on some of the inclosed lands *with the intention of getting china clay there, which intention however they almost immediately abandoned, and did not again enter. The getting of china clay is carried on by open workings, which cause an entire destruction of the surface, and it was admitted on both sides that the clay could not be got otherwise.

The plaintiffs filed their bill alleging that the lessees threatened to enter, if they had not already entered, upon the *Greys* estate; as well the inclosed as the uninclosed parts thereof; and

to commence working for china clay thereon. The plaintiffs charged that the china clay was not a mineral included in the reservation of mines and minerals, and that no one entitled to the mines and minerals under the reservation had any authority to get them by open workings. The bill prayed for an injunction to restrain the defendants from getting china clay out of the *Greys* estate, and for an account of the china clay already gotten.

The defendants *Gill* and *Ivimey*, by their answer, stated that in or about the reign of *Henry VI.* the ancient manor of *Treverbryn*, having devolved upon two co-heiresses, was divided into two manors, *Treverbryn Courtenay*, and *Treverbryn Trevanion*, and that certain ancient tenements of the manor of *Treverbryn* were allotted in severalty to the two new manors; but that the wastes, of which *Garka Moor* was part, were not so allotted, but were held in common. They went on to say that the *Greys* estate was allotted to *Treverbryn Courtenay*; that it consisted entirely of old inclosures, and that there was no uninclosed ground belonging to it; and that the manor of *Treverbryn Courtenay* was in 1799 the property of the Duchy of *Cornwall*, the manor of *Treverbryn Trevanion* belonging to another owner. In 1856 *Gill* and *Ivimey* purchased the manor of *Treverbryn Courtenay*, with all its rights and appurtenances; and in 1859 the manor of *Treverbryn Trevanion*. They thus became owners of the soil of the entirety of *Garka Moor*. They denied the title of the plaintiffs to the uninclosed land alleged to form part of the *Greys* estate, and denied that any china clay had been gotten out of any land to which the plaintiffs were entitled. They went on to say that the lessees had not "any present intention" of entering upon the *Greys* estate for the purpose of getting china clay or any other mineral; and that it was the desire of them (*Gill* and *Ivimey*) that the *Greys* estate "should not at present be [703 *interfered with;" and that *Derry* and *Scott*, in compliance with that desire, had abstained from interfering with it. But they (*Gill* and *Ivimey*) insisted that by reason of the reservation they were entitled to the china clay within the limits of the *Greys* estate, and to work for and get it by open pits and workings from the surface; such being, in fact, the only practicable mode of getting it. They alleged that open workings from the surface, by streaming for tin, had taken place from time immemorial on the *Greys* estate.

Derry and *Scott*, by their answer, said that they had entered on part of the *Greys* estate with the intention of getting china clay, which intention, at the request of *Gill* and *Ivimey*, they had almost immediately abandoned; and that having been requested by *Gill* and *Ivimey* to desist from working there, they had no present intention of entering upon the estate.

The defendants also stated, by their answer, that they had not done any damage to the *Greys* estate except once, by accident, when a landslip took place in their workings close to the boundary of *Greys*.

The process of getting china clay was thus described in the plaintiff's evidence; the correctness of which, in this respect, was not disputed :

“ Granite consists of quartz, feldspar, and mica ; and china clay consists of decomposed granite in which feldspar exists in considerable proportions. To make china clay fit for the market, the feldspar, which alone is merchantable, has to be separated from the other component parts of the said decomposed granite. The working of china clay is commenced almost in the same manner as quarrying for building stone, namely, by the removal of the soil covering the clay, which lies in beds of more or less thickness. The working is then carried on by turning a stream of water over the head of the clay, when so arrived at, and washing the same forward into channels and reservoirs ; in which reservoirs the pure clay is held in solution, and separated from the impurities, by the same impurities, which are heavier, being precipitated to the bottom of the reservoir, while the pure clay is allowed to run forward, over the top of the reservoir, into a pit where it settles down, and is dried and made solid, either by exposure to the sun or by a drying kiln, after which it is fit for sale in the market. The injury done *in clay [704 working to the surface of the land is the total, or the almost total destruction of the surface where the excavations are made ; for the clay is excavated to a depth which renders the land useless for agricultural purposes, either by the loss of all soil suitable for such purposes, or by reason of the cost of refilling and levelling the pits excavated being greater than any return to be obtained from the imperfect restoration of the land for agricultural purposes.

“ Streaming ” for tin appeared from the evidence in the cause to be the usual ancient way of getting tin in *Cornwall*. It was a process for obtaining grain tin by means of washing ; and it was necessarily carried on entirely by means of open workings. There was some conflict of evidence as to whether the surface was irreparably destroyed by it ; the plaintiff's evidence going to show that the land was often filled in and levelled, and the soil replaced when the working was over ; and the defendant's evidence making the destruction of the surface appear to be as complete as in the case of working for china clay. In modern times tin had been obtained by mining to a much greater extent than before. There was a conflict of evidence as to whether tin works had been carried on within *Greys* inclosures. There was

some evidence to show that before the grant in 1799, china clay had been gotten in an adjoining parish, but it had never been gotten in the parish in which *Greys* was situate, nor was any gotten out of any of the lands of the duchy of *Cornwall* till some years after that time.

With respect to the twenty-seven acres, it appeared in evidence that the tenants of *Greys* had for a considerable number of years treated themselves as entitled to the exclusive use of it to this extent, that they alone cut the furze and took turf from it, and occasionally for the purpose of sale. It appeared also that the owners of other tenements took turf exclusively from certain other portions of *Garka Moor*; the twenty-seven acres not being fenced off, although distinguished by landmarks. There was a mass of conflicting evidence, upon the result of which the Court came to the conclusion that the twenty-seven acres did not in 1799 form part of the copyhold tenement called *Greys*. There was, however, nothing else answering to the 27A. 2p. mentioned in the conveyance, nor could the 103 acres be made up without including it.

*Vice-Chancellor *Wickens* considered that the terms of the [705 reservation justified the defendants in getting the china clay in the way in which they were getting it, and he dismissed the bill ('). The plaintiffs appealed.

(') 1872. March 13.

SIR JOHN WICKENS, V.C.:

This case seems to me to turn upon the effect of the reservation contained in the deed of the 4th of January, 1799.

The cases which have been cited upon the constructions of this reservation are very numerous and very embarrassing; the truth is, that the words here used became customary legal words in deeds when natural science was far less advanced than it is now, and that the problem, which has been found difficult by many Judges, has been to give them their proper meaning without doing great and obvious injustice.

The original meaning, probably, of the term "mines and minerals" was mines and substances got by mining; but etymology is a very unsafe guide to meaning, and I must hold that the word "minerals" long ago acquired a meaning of its own, independently of any question as to the manner in which the minerals themselves are gotten. Under the circumstances, however, there is no wonder that some inclination may be thought to have arisen on the part of Judges to give more weight

than ought to have been attributed to some small circumstances of context, and to cut down the proper and ordinary meaning of the words "mines and minerals."

According to the evidence, kaolin or china clay is a metalliferous mineral, perfectly distinguishable from and much more valuable than ordinary agricultural earth, and which produces metal in a larger proportion to its bulk as compared with ordinary ores, but which it is not commercially profitable to work in *England* for the purpose of extracting the metal from it. Therefore kaolin is excepted from the grant under which the plaintiff claims, unless there can be shown some custom of the country, something in the grant itself, or something in the reason of the thing, sufficient to induce the Court to consider the terms as used in a restricted and secondary sense. It was not suggested that I could recognize any custom of the country under which the term "mines and minerals" could have any definite meaning which would exclude kaolin, and I have failed to discover anything in the special expressions of this deed which would do

706] *Mr. *Munisty*, Q.C., Mr. *Eddis*, Q.C., and Mr. *Boger*, for the appellants:

A reservation of mines and minerals has commonly been understood as applying only to substances got by mining as distinguished from quarrying or open working. *Darvill v. Roper* ⁽¹⁾, *Brown v. Chadwick* ⁽²⁾, and *Listowel v. Gibbings* ⁽³⁾ all support this view. The meaning of the word "mine" is shown by *Rex v. Brettell* ⁽⁴⁾, *Rex v. Dunsford* ⁽⁵⁾, and *Rex v. Inhabitants of Sedgely* ⁽⁶⁾. But even if the words "mines and minerals" cannot be so far restricted, such a construction must be put on the reservation as will not allow it to be destructive of the grant; and it cannot be held to allow a mode of working which will cause a complete

707] destruction of the *surface where there is no provision

so; the only words which appear to bear upon the point are "within and under." These words were commented upon by the master of the rolls in the case of *Midland Railway Company v. Checkley* (Law Rep., 4 Eq., 19), where he considers the distinction between "within" and "under," and that "within" denotes something which is not under, and this distinction seems to me rather to point in the defendant's favor.

No doubt the case of *Bell v. Wilson* (Law Rep., 1 Ch., 303) seems to import that under the reservation of minerals contained in the deed which was in question in that case the only reservation was of what could be got by mining proper, and Lord Justice *Turner* unquestionably considered that it was necessary, in order to come to the conclusion at which he arrived, to find something in the context in the deed which cut down the words from their original extensive meaning, and he found the words "opened and unopened." It would, I confess, have seemed to me doubtful whether these words were quite sufficient to authorize the construction put upon that deed; but, as I said before, however that may be, that was the ground upon which the Lord Justice proceeded.

Here I can find nothing whatever in the deed to affect the ordinary construction of the words "mines and minerals," and therefore if kaolin is to be excluded from the reservation, it must be by the reason of the thing, or, in other words, from a supposed inconsistency between there being any such grant as the deed contains and any such reservation as it purports to contain.

Of course it would not advance the plaintiff's case to say that either party knew or suspected the existence of such a mineral as kaolin in 1799, nor can the plaintiffs carry their case to the height of asserting that from the reason of the thing no metal or mineral is to be gotten under the reservation except by mining as distinguished from digging; for not to mention other things, both parties must have had tin in their minds, which appears to be often got by such diggings, or, at least, by operations destructive of the surface, and having nothing in common with mining.

The real difficulty of the case rests in this, that the reservation, if construed according to the full and strict meaning of the words, may be absolutely destructive of the entire grant, and that without compensation. No doubt it is difficult to bring one's mind to accept such a view of the reservation, still the terms must prevail unless they can be limited on one or other of the grounds mentioned above; they cannot be intended to mean nothing, and if they do not mean that which they import the question arises, what is the true meaning? To that question no answer has been suggested which commands itself to my mind. I therefore must hold that the reservation of the mines and minerals is a reservation of this china clay, and must dismiss the bill with costs.

(¹) 3 Drew., 294.

(²) 7 Ir. Com., Law., 101.

(³) 9 Ibid., 223.

(⁴) 3 B. & Ad., 424.

(⁵) 2 A. & E., 568.

(⁶) 2 B. & Ad., 65.

for compensation. *Bell v. Wilson* ⁽¹⁾ is decisive on this point, and must be overruled if the decision under appeal is to stand. This is supported by the analogy of the cases in which it has been held that, in the absence of very clear words, working which causes a subsidence of the surface is not authorized, though there be a provision as to compensation for damage done to the surface: *Harris v. Ryding* ⁽²⁾; *Humphries v. Brogden* ⁽³⁾; *Smart v. Morton* ⁽⁴⁾. In *Duke of Buccleuch v. Wakefield* ⁽⁵⁾, under very special words, it was held that the mine owner might destroy the surface; but that conclusion evidently would not have been come to if as here there had been no provision for compensation. The cases of *Hilton v. Earl Granville* ⁽⁶⁾, *Roberts v. Haines* ⁽⁷⁾, and *Blackett v. Bradley* ⁽⁸⁾ show how strongly the Courts lean against allowing a complete destruction of the surface. *Bullen v. Denning* ⁽⁹⁾, *Mudgley v. Richardson* ⁽¹⁰⁾, and *Hedley v. Fenwick* ⁽¹¹⁾ show the inclination to put a restricted construction on such reservations. The question as to the twenty-seven acres is proper to be tried at law.

[Both parties here concurred in requesting that the Court would decide on the question of title.]

Then we say, on the evidence, that the twenty-seven acres were always part of the *Greys*, but if not, the grant of 1799, must be held to pass them, as the quantity of land thereby expressed to be conveyed cannot be made up without them.

The *Solicitor General* (Sir G. Jessel), Mr. *Karslake*, Q.C., and Mr. *Phear*, for the respondents:

Upon the evidence, we say that the twenty-seven acres never formed part of *Greys*, but were part of *Garka Moor*, and the right of the lord of the manor to get every kind of mineral substances from under the moor by open workings is not questioned by the bill. The conveyance of 1799 only purports to convey what constituted the copyhold tenement called *Greys*; the acreage *is mere matter of description, and its being too large [708 does not show an intention to grant more than the copyhold, and if it did the lord of *Treverbyn Courtenay* had only an undivided moiety of *Garka Moor*; so that the plaintiffs could not have got the entirety of the twenty-seven acres. Our working on the twenty-seven acres, therefore, cannot be restrained, and there has been nothing but an accidental encroachment on the old inclosures, with an express denial of an intention to work there. The allegation, therefore, that we threaten and intend to interfere with any ground on which we have no right to work

(1) Law Rep., 1 Ch., 303.

(2) 5 M. & W., 60.

(3) 12 Q. B., 739.

(4) 5 E. & B., 30.

(5) Law Rep., 4 H. L., 377.

(6) 5 Q. B., 701.

(7) 6 E. & B., 643.

(8) 1 B. & S., 940.

(9) 5 B. & C., 842.

(10) 14 M. & W., 595.

(11) 3 H. & C., 349.

is not made out, and the Court will not interfere to restrain trespass unless a case of irreparable damage is shown. The plaintiffs' case therefore fails: *Gibson v. Smith* ⁽¹⁾; *Mogg v. Mogg* ⁽²⁾; *Mitchell v. Dors* ⁽³⁾; *Smith v. Collyer* ⁽⁴⁾; *Courthope v. Mapplesden* ⁽⁵⁾; *Kinder v. Jones* ⁽⁶⁾; *Earl Cowper v. Baker* ⁽⁷⁾; *Thomas v. Oukley* ⁽⁸⁾; *Davenport v. Davenport* ⁽⁹⁾; *Haigh v. Jaggard* ⁽¹⁰⁾; *London and North Western Railway Company v. Lancashire and Yorkshire Railway Company* ⁽¹¹⁾. But we say that, even under the old inclosures, we are entitled to get the china clay by the usual mode of working. The reservation includes the china clay, which certainly comes within the term "minerals": *Micklethwait v. Winter* ⁽¹²⁾; *Midland Railway Company v. Checkley* ⁽¹³⁾; *Earl Rosse v. Wainman* ⁽¹⁴⁾. The words "mines and minerals" cannot be cut down unless there is some explanatory context to restrict them. The reservation of minerals includes a right to get them, though to the destruction of the surface: *Rowbotham v. Wilson* ⁽¹⁵⁾; *Duke of Buccleuch v. Wakefield* ⁽¹⁶⁾. We therefore must be entitled to get the china clay in the only way in which it can be gotten; and moreover, express power to dig for it is given. The cases in which it was held that the surface must not be let down were cases where the Court had not before 709] it the instrument under *which the mine owner derived title, and do not apply where the instrument gives a right to work. Still less can they apply where the mineral is one which can only be got by destroying the surface. They only show that workings must not be carried on in such a way as to produce damage which may be avoided. It is clear that this reservation includes tin and the right to get it. But at the time of the grant the usual mode of getting tin was streaming, which is as destructive to the surface as the getting of china clay.

[They also referred to *Earl Beauchamp v. Winn* ⁽¹⁷⁾.]

Mr. Manisty, in reply, referred to *Dugdale v. Robertson* ⁽¹⁸⁾ and *Roads v. Overseers of Trumpington* ⁽¹⁹⁾.

July 22. SIR G. MELLISH, L.J.:

This is a suit instituted by the owners of a small estate called *Greys*, in the county of *Cornwall*, against the lords of the manors of *Treverbryn Courtenay* and *Treverbryn Trevanion* and their tenants, to restrain them from getting china clay under the property

⁽¹⁾ 2 Atk., 182.

⁽²⁾ 2 Dick., 670.

⁽³⁾ 6 Ves., 147.

⁽⁴⁾ 8 Ibid., 89.

⁽⁵⁾ 10 Ibid., 289.

⁽⁶⁾ 17 Ibid., 110.

⁽⁷⁾ Ibid., 128.

⁽⁸⁾ 18 Ibid., 184.

⁽⁹⁾ 7 Hare, 217.

⁽¹⁰⁾ 2 Coll., 231.

⁽¹¹⁾ 6 Ex., 644.

⁽¹²⁾ Law Rep., 4 Eq., 19.

⁽¹³⁾ Law Rep., 4 Eq., 174.

⁽¹⁴⁾ 14 M. & W., 859.

⁽¹⁵⁾ 8 H. L. C., 848.

⁽¹⁶⁾ Law Rep., 4 H. L. 377.

⁽¹⁷⁾ Law Rep. 4 Ch., 562.

⁽¹⁸⁾ 3 K. & J., 695.

⁽¹⁹⁾ Law Rep. 6 Q. B. 56.

called *Greys*, which is alleged in the bill to consist of old inclosures and of about twenty-seven acres of uninclosed land. The title of the plaintiffs to the inclosed part is not disputed, but as respects the uninclosed part the defendants deny the title and also the possession of the plaintiffs, and say that what is in the bill styled the uninclosed part of *Greys* is in fact part of *Garka Moor*, and that they, as lords of the two manors, are entitled to the soil of that moor. This raises a question of title which ought properly to be tried at law by an action of ejectment; but both parties have requested us to decide the question instead of sending them to law, and therefore before I go into the remaining questions I will deal with that question of title.

[His Lordship then stated the cases made by the plaintiffs and defendants as to the uninclosed twenty-seven acres, and the evidence as to the extent of the copyhold tenement, and continued:]

*We have to decide as a question of fact what is the result of that evidence. In the first place, nobody can doubt that before the manors were separated *Garka Moor* was a waste common, the freehold of which was in the lord of the manor of *Trevanion*, the copyholders having only certain rights over it. That being so, whenever the manor was divided into two it is difficult to say that what was freehold and not copyhold could by any legal means become annexed to the copyhold estate called *Greys*, so as to become part of it, and whether it could be so annexed except by Act of Parliament is doubtful. It appears to us, judging as a jury would upon the question of fact, that the proper way to reconcile the whole of the evidence is to presume that at some time, possibly at the very time when the manors were separated, the tenants who had a right of common over the *Garka Moor* common being but few, an arrangement was come to between them, possibly with the consent of the lord, that each of them should enjoy a separate common right to take the pasture and turf off a particular portion of the common instead of their equally enjoying it together.

If we suppose that to have taken place, Mr. *Spry*, who made for the duchy the old map and terrier which have been produced, finding that state of things, might naturally come to the erroneous conclusion that a certain portion of the waste was part of the copyhold called *Greys*, and lay it down in his map as being so. All the evidence will thus be accounted for. The result is that this piece of moor was part of the moor which the two lords held as tenants in common in moieties, and was not part of the copyhold estate called *Greys*. Then it was argued on behalf of the plaintiffs that because the parcels of the deed of 1799 include a parcel of land running with *Garka Moor* containing

twenty-seven acres, and these twenty-seven acres cannot be found in the inclosed part of *Greys*, therefore twenty-seven acres (although how we are to get the bounds I do not know) are to be taken out of the moor. That I think is not the true construction of the deed. The deed professes to convey "all that customary or copyhold tenement called *Greys*," and the rest is simply a description of what is contained in *Greys*, and it is said besides, "which said tenement called *Greys* is now held for the life of *John Hext*, gentleman, under the yearly rent of 15s. 3d. by copy of Court roll." It appears to me that nothing *but what was part of the customary or copyhold tenement called *Greys* could pass under that, notwithstanding there might be any misdescription in the parcels. If the tenement called *Greys* was entitled to an exclusive right of common over a portion of the moor which by mistake had been treated as if it were parcel of the copyhold tenement, the consequence would be that the exclusive right of common would pass, but the property in the soil would not pass. Therefore, upon the whole, I come to the conclusion that the plaintiffs have not made out their title to what they call, as I think erroneously, the uninclosed part of *Greys*, and therefore cannot have any relief respecting it, the bill not being framed for raising the question whether the getting china clay can be complained of by persons only entitled to rights of common over the land.

Then I come to the question whether the plaintiffs are entitled to relief respecting the inclosed part of *Greys*. Mr. *Karslake* raised the objection that the defendants have not threatened to get, and have not — except by mere accident — got any china clay in *Greys*; and therefore that this Court ought not to grant an injunction, or enter into the question whether they are entitled to get it or not.

The facts upon this part of the case are these: It appears that the first two defendants, as lords of the manor, have let to the two other defendants the right to get china clay in the waste and over a large portion of the estate called *Greys*, and therefore they profess to exercise the right of ownership over it, and they have professed to give them the power to get china clay from *Greys* in the ordinary way in which china clay is got in that neighborhood. It appears that the lessees have entered on one occasion into the estate called *Greys* with the intention of getting china clay, though they did not get any, and did not remain there. The bill being filed and the question raised, the defendants being sought to be restrained from getting china clay, they say, "we have a title to get china clay, out of the estate called *Greys*, and we are entitled to get it in the way in which it is ordinarily got; but we have no present intention of

getting it." We are of opinion that after this it is idle for the defendants to say they do not threaten to get the china clay under the inclosed part of *Greys* and to contend that *this Court is precluded from deciding the question [712 whether they are entitled to get it in the way in which they say they have a right to get it.

That brings us to the real question on the merits, whether the defendants, having had the manor *Treverbyn Courtenay* conveyed to them, have a right to get the china clay under the reservation and exception in the deed of 1799.

The first question to be determined is whether the china clay is within the exception of "mines and minerals." Now china clay is thus described:—[His Lordship here read the account of china clay, and the mode of getting it, from the plaintiffs' evidence, as above.]

Is this china clay reserved under the exception of "mines and minerals?" There was a great deal of discussion before us as to the meaning of the word "mines," whether it is confined to underground working, or may possibly extend to open working, or whether it does not apply to the workings at all, but in this sort of reservation means the metal, the veins, and seams themselves, which are in a secondary sense called "mines." I think that is not necessary here to go into those question, for whatever may be the meaning of the word "mines when used alone, it is here combined with the more general word "minerals," and the authorities seem to show that where there is an exception of "mines and minerals," the putting the word "mines" before "minerals" does not restrict the meaning of the word "minerals." Many authorities, some at law and some in equity, have been brought before us to show what is the meaning of the word "minerals." But the result of the authorities, without going through them, appears to be this: that a reservation of "minerals" includes every substance which can be got from underneath the surface of the earth for the purpose of profit, unless there is something in the context or in the nature of the transaction to induce the Court to give it a more limited meaning. Ought it to have a more limited meaning in the present case? The circumstances, as far as they are material to be stated, are these: The seller was the lord of the manor. What he sold was the freehold of a copy hold tenement. Now the lord of a manor is, beyond all question, entitled to all minerals, in the most general sense of the word, *under a copyhold tenement. There is [713 nothing to be got out of the soil and sold for a profit which the copyhold tenant, in the absence of some special custom is entitled to get without the permission of the lord; the property of it is in the lord, although it is true that, in the absence of special

custom, the lord cannot get it without the license of the tenant. The position of the parties, therefore, furnishes no reason for restricting the meaning of the word "minerals," and there being no special words before "mines and minerals" which might furnish an argument for restricting them to things *ejusdem generis*, I am of opinion that the surface, and all profit that can be got from cultivating the surface, or building on it, or using the surface, is intended to be conveyed, but that the right to everything under the surface, and to all profit that can be got from digging anything out from under it, is intended to be reserved. I am therefore of opinion that china clay is included in the reservation. The only argument against that is that china clay cannot be got without destroying the surface, and that it could not be intended to give power wholly to destroy the surface without compensation. The case of *Bell v. Wilson* ⁽¹⁾ appears, however to be a direct authority that the mere circumstance that a mineral cannot be got without destroying the surface, though it may be a very strong ground for holding that the owner of the mineral is not entitled to get it, is not a ground for straining the meaning of the word "mineral." In that respects the Lords Justices differed from Vice-Chancellor *Kindersley*, and we are bound by their decision.

Then we come to the important question, whether there is power to get this china clay in the only way in which, according to the concurrent testimony of all the witnesses, it can be got, by a process which utterly destroys the surface of the land. A great number of cases were cited to us upon that point, in none of which was the language exactly similar to that in the case before us, and they must be referred to merely for the purpose of getting a principle from them. Now the cases show that where the ownership of minerals is separate from the ownership of the surface, *prima facie* the owner of the surface is entitled to have his surface supported by the minerals. That is not confined, as contended by the *Solicitor General, to the case where the Court has not before it the instrument under which the owner of the minerals derives his rights, but it also applies to cases where the Court has the instrument before it, for the purpose of construing the instrument, to this extent, that *prima facie* the right to support exists, and the burden lies on the owner of the minerals to show that the instrument gives him authority to destroy what is described by the judges as the inherent right of a person who owns the surface apart from the minerals. The question is, whether the words of the reservation in the present case mean that the ownership of the surface is altogether to be subject to the ownership of the minerals, so that the owner of

(1) Law Rep., 1 Ch., 303.

the minerals may do whatever is necessary for the purpose of enabling him to get them, although it may of necessity utterly destroy the surface; or do the words, according to their true construction, only give a right, in the nature of an easement, to go upon the surface and dig through it for the purpose of getting at the minerals underneath? In my opinion, the short and ambiguous words of this reservation, according to their fair construction, only give a right to create what I may call temporary damage, and do not authorize the owner of the minerals absolutely to destroy or to cause a serious continuous and permanent injury to the surface.

Now if we refer to the authorities we find that there are several cases relating to the right of the owner of minerals to let down the surface in the course of getting the minerals by pure mining — cases in which the power of getting the minerals has been given in far stronger language than it is in the present case where, nevertheless, the Courts held that he was not entitled to get the whole of the minerals if that involved the destruction of the surface, but that in getting them he must have regard to the rights of the owner of the surface to support by the minerals. In *Harris v. Ryding* ⁽¹⁾ the power was this: “With full liberty of ingress, egress, and regress to come into and upon the thereby appointed and granted and released premises to dig, &c., the said mines, &c., and every part thereof, and to sell and dispose of, take and carry away, whatever might be there found at their or his respective wills and pleasures; and also to sink shafts, &c., for the raising up, working, carrying away, and disposing of the same or any part*thereof, making a fair compensation to [715 *T. P.* (the grantee) for the damage to be done to the surface of the said premises and the pasture and crops growing thereon.” In *Roberts v. Haines* ⁽²⁾ the owner of the minerals was expressly authorized “to search for, dig, get, and raise any coal and ironstone lying and being in or under the common and waste lands, and to erect any work or works for that purpose, and to dig and take earth for making and to make bricks for any such work or works; and to carry away and dispose of such coal and ironstone to and for his and their own use.” In *Smart v. Morton* ⁽³⁾ the words were: “With free leave and liberty to sink, work, and win the same in any part of the said premises, and to drive drift or drifts, make watergate or watergates, or use any other way or ways for the better and more commodious working and winning the same in the said hereby granted or intended to be granted premises, or any part thereof.” In *Bell v. Wilson* ⁽⁴⁾, which is a most important authority, since it related not merely

⁽¹⁾ 5 M. & W.. 60.

⁽²⁾ 6 E. & B., 643.

⁽³⁾ 5 Ibid., 30.

⁽⁴⁾ Law Rep., 1 Ch. 303.

to the letting down of the surface by working underground, but to the working from above, the words of the reservation are such that the case appears to me almost decisive of the present. I believe it will be found that every single word contained in the present power is contained in the power in *Bell v. Wilson*, along with many other words; yet under that reservation, worded in a way more favorable to the owner of the minerals than that with which we have to deal, the Lords Justices held that although stone was reserved as a mineral, yet there was no right to get it by quarrying.

There are, however, two cases which ought to be referred to, in which the House of Lords held an owner of mineral entitled to let down the surface or absolutely to destroy the surface for the purpose of getting the minerals. The first of those cases is the case of *Rowbotham v. Wilson* ⁽¹⁾. In that case there was a covenant which the House of Lords construed to be a grant that the mines should be held and enjoyed, worked and gotten, "without any molestation, denial, or interruption of any other person or persons parties to these presents, and those claiming under them respectively, who for the time being are or may be
716] *owner or owners of the surface of the lands under which such mines are situate, and without being subject or liable to any action or actions for damage on account of working and getting the said mines for or by reason that the surface of the lands aforesaid may be rendered uneven and less commodious to the occupiers thereof by sinking in hollows or being otherwise defaced and injured where such mines shall be worked." The instrument, therefore, said in terms that the surface might be let down, and no doubt the House of Lords decided contrary to what was said in the judgment in *Hilton v. Earl Granville* ⁽²⁾, that such a grant, where it is clearly expressed, is not void. Again, in the case of the *Duke of Buccleuch v. Wakefield* ⁽³⁾, the House of Lords held that power was given absolutely to destroy the surface. That is the only case which resembles the present, in this, that it related to a peculiar kind of mineral which could not be got at all without destroying the surface. But if that case is looked into it will be found to differ from the present in three most material respects. In the first place, the iron ore, which was the mineral then in question, had been got in very large quantities by the lord of the manor before the Act of Parliament for inclosing the waste was passed. It was a most valuable mineral, so that it was impossible to suppose it not to have been in the contemplation of the parties at the time they obtained their Act, and it was proved that the lord of the manor had constantly let similar iron mines in the manor, paying compensation for

(1) 8 H. L. C., 348.

(2) 5 Q. B., 701.

(3) Law Rep., 4 H. L., 377.

the damage which was done. In the next place, without stopping to read the whole of the reservation in that case, it will be found that it contains far more extensive words than the reservation in the present case. It contained powers which, as is pointed out in the judgments, clearly enabled in certain events the surface to be destroyed. There was an unlimited power to deposit the refuse of the minerals on the surface, and there was unlimited power of erecting buildings upon the surface, and there were at the end most general words enabling every power to be exercised which was necessary to get the minerals. In the last place, there was a clause which enabled full compensation to be given for any damage that might be done. Taking the whole of these circumstances into consideration, the House of *Lords, reversing the decision of Vice-Chancellor *Malins*, [717 came to the conclusion that, according to the true meaning of the Act, the lord of the manor was to be entitled, if he found it necessary for the purpose of getting what was known to all parties to be a most valuable mineral, to destroy the surface on making compensation; or, in substance, that, for the purpose of getting the minerals, he should have power to buy the surface back, paying the full value for it. I think that no one can read the judgment without coming to the conclusion that if the provision as to compensation had not been there the House of Lords, notwithstanding the strength of the other words, would in all probability have come to a different conclusion. In the present case there is no reason to suppose that the parties had china clay in contemplation at the time when the deed was executed. There is, indeed, one old man who proves, and I do not dispute the correctness of what he says, that china clay was at the time being got in one neighboring parish, but it is proved that it was not got in the parish in question for a great many years afterwards. And it is also proved that it was not until years after this that the Duchy of *Cornwall* received any dues for getting china clay. Upon the whole, therefore, I come to the conclusion that the words here used are not sufficiently clear to give the owner of the mines the absolute power of destroying the surface, and that the defendants have not the right they claim.

There is one argument that I should, perhaps, notice. It was urged that streaming for tin had been used in *Cornwall* from time immemorial; that therefore it was impossible to suppose that the right of streaming for tin was not intended to be reserved; and that, as streaming for tin involved an injury to the surface of the same kind, if not quite to the same extent, as the taking of china clay, the fact that taking the china clay involved the destruction of the surface was no sufficient reason for holding the right to take it not to be reserved. I do not wish to give

any decisive opinion whether the right of streaming for tin is reserved or not, as that question is not before us, and may be of very great importance. That question does not stand quite on the same footing as the question relating to the taking of china clay. There is no doubt that streaming for tin was a thoroughly well-known and common process. At the same time, 718] tin might be got by mining, and the *owner of the minerals would not, by being precluded from streaming, be deprived of all power to get it, and, as at present advised, I do not think that the words of the power in the present case are sufficient to confer a right of streaming for tin. When an owner of both surface and minerals sells the surface and reserves the minerals, with power to get them, he ought, if he intends to have the power of destroying the surface in getting them, to frame his power in such language that the Court may be able to say that such was clearly the intention of the parties. The Vice-Chancellor in his judgment fully acknowledged the difficulty that, if the defendants had the right to take china clay, the reservation might be absolutely destructive of the grant, but said he could not see where he was to fix the limit to the reservation if its words were not to be taken according to their full and strict meaning. I feel myself that it is very difficult to say where the limit is to be placed. It is very difficult to lay down exactly what the owner of minerals may do for the purpose of getting them; but I do not think it would be right or just to the owner of the surface to say that his surface may be destroyed because there may be a difficulty in saying exactly what the owner of minerals may do and what he may not do in every case. In the present case I think the result is this, that the general reservation of minerals includes the china clay, a mineral the existence of which apparently was not known to the parties at the time when the instrument was executed, and which cannot be got without destroying the surface. It appears to me that the fair result of that state of things is that the lord of the manor is practically in the same position as he would have been in if this had remained a copyhold tenement, viz., that the right to the clay is in him; but inasmuch as he has not reserved the power to destroy the surface, and inasmuch as this clay cannot be got without destroying the surface, he cannot get the clay unless he can make some arrangement with the owner of the surface. I am, therefore, of opinion that the plaintiffs are entitled to have an injunction to restrain the defendants from getting the china clay in such a way as to destroy or seriously injure the surface; but as they have failed in one most essential part of the case — namely, the part relating to the twenty-seven acres — they ought to have no costs.

SIR W. M. JAMES, L.J. :

I entirely concur both with the conclusions and reasoning of the Lord Justice. The long and uniform series of authorities appear to me to have established a very convenient and consistent system, giving the mineral owner every reasonable profit out of the mineral treasures, and at the same time saving the landowner's practical enjoyment of his houses, gardens, fields, and woods, without which the grant to him would have been illusory.

But for these authorities I should have thought that what was meant by "mines and minerals" in such a grant was a question of fact what these words meant in the vernacular of the mining world and commercial world and landowners at the end of the last century; upon which I am satisfied that no one at that time would have thought of classing clay of any kind as a mineral.

Solicitors: Messrs. *Bell, Brodrick, & Gray*; Mr. *T. Gill*.

L. JJ. July 20, 22, 1872.

BUDGE V. GUMMOW.

[Law Reports, 7 Chancery Appeals, 719.]

1864 B, 154.

Trustees — Improper Investment — Insufficient Value.

Trustees were charged with the loss occasioned by an investment of the trust funds on insufficient security. The property was a hotel in the country, and the trustees had sent down a *London* surveyor who valued the hotel, including therein the license, at nearly double the sum to be advanced. The hotel turned out to be worth much less than the sum advanced. The trustees gave no further account of the circumstances under which the advance was made:

Held (reversing the decision of *Bacon*, V.C.), that the trustees were chargeable with the sum so advanced.

THE trustees in this case held funds under the marriage settlement and under the will of *Michael Gummow*. Under each instrument the trustees had power to invest in Government or real securities. The settlement contained the usual trustees' indemnity clause; and the will contained a declaration that the trustees were not to be answerable for involuntary losses. The trustees had, out of the blended funds so held, advanced £1400 on mortgage of a *freehold hotel at *Broadstairs*, upon [720 which a heavy loss had been incurred.

The only evidence as to how the advance had been made was on an affidavit of the trustees. By that affidavit it appeared that before the advance was made Mr. *Harbin*, a solicitor and the acting trustee, had employed a competent *London* surveyor to go to *Broadstairs* and value the property on which the advance was to be made. The property was a freehold hotel lately built, and called the *Balmoral Hotel*, then let for £120 per au-

num. The surveyor made his report, in which he valued the property at £2700, but that valuation included the sum of £800 at which he valued the license. The trustees thereupon, in April, 1855, advanced the £1400 to the owner of the fee in the hotel, and took a mortgage in fee for that amount. The then tenant of the hotel soon afterwards failed, as did a subsequent tenant, and the hotel was shut up until 1860, when it was let for £50 a year. The mortgagor had not paid the interest, and the trustees had advanced sums for repairs, and in other ways, so that, with the arrears of interest, there was a total loss to the estates of £2114.

The trustees, in 1864, instituted a suit for the administration of the two estates. A decree was made and accounts were directed. The trustees made an affidavit as above mentioned, and the *cestuis que trust* produced evidence by surveyors that the property was worth between £800 and £900. The chief clerk disallowed to the trustees the sum of £1400 so advanced.

The trustees then took out, before the Vice-Chancellor *Bacon*, a summons to vary the certificate of the chief clerk, and the Vice-Chancellor *Bacon* directed the certificate to be varied accordingly ⁽¹⁾.

The *cestuis que trust* appealed.

Mr. *Eddis*, Q.C., and Mr. *Waller*, for the appellants, cited *Stretton v. Ashmall* ⁽²⁾; *Jones v. Lewis* ⁽³⁾.

Mr. *Kay*, Q.C., and Mr. *Speed*, for the trustees:

The trustees acted with as much care as if they had been advancing their own money. What could they do more than take the opinion of a competent surveyor? It had been suggested that they ought to have employed a local surveyor who would

⁽¹⁾ 1872. March 22.

SIR JAMES BACON, V.C.:

There is no doubt that a trustee who deals with trust property as carefully as if it were his own property commits no breach of trust. Now in this case the trustees employed a competent person to go to *Broadstairs* and examine the property. He found it occupied by a respectable tenant as a hotel, and held at a sufficient rent. No doubt, in estimating the value of the property, the surveyor took into consideration the value of the public house license, and it was contended that this ought not to have been done. It is true that a public house license is a merely personal thing, but still a licensed public house has a particular value of its own; and even if the tenant had to be turned out, the owner could have obtained an-

other tenant and another license, and so the value of the house would have remained unimpaired. Then, after the lapse of fourteen or fifteen years, certain surveyors and valuers are brought forward to say that in 1855 the house was not worth £900. But no sufficient case has been made for charging with the loss the trustees, who had employed a competent person to value the property before they advanced the money. Although the investment, from subsequent events which could not have been foreseen, had resulted in a heavy loss, there had been no breach of trust, and the amount must be allowed to the trustees. As to the sums paid for repairs and the other expenses, I have no sufficient evidence, and there must be a further inquiry respecting them.

⁽²⁾ 3 Drew., 9.

⁽³⁾ 3 De G. & Sm., 471.

have known more about it. But the practice is quite the other way, and *London* surveyors in whom the lenders have confidence are very generally employed. Certainly the investment has turned out unfortunately, but we must not look at it as it appears now, but as it appeared in 1855.

[The LORD JUSTICE JAMES: I never before knew a case of this kind in which the trustees have not shown how they were induced to lend the money.]

The trustees have made an affidavit which they conceived to be quite sufficient. There is no case of fraud or *malo fides* alleged or suggested against them; at all events there are no materials now before the Court to enable the Court to say that the trustees acted improperly.

SIR W. M. JAMES, L.J.:

In this case I am compelled to decide against the trustees however painful it may be. In my opinion it would be *pessimi exempli* *if it should go forth to the world that trustees [722 might lend trust money under such circumstances as these before us.

We know that £1400 was lent upon property which will not now produce more than £50 a year, and persons really acquainted with it say that it was not worth more than £800 or £900. The trustees have contented themselves with producing the report of the surveyor employed by them.

[His Lordship then read the report.]

It appears to me that that report is one upon which no sensible or prudent man would ever lend such a sum as £1400. The value of the hotel license was thrown in, but how could a land surveyor, who was a stranger to the place, estimate the value of the license? The trustees ought to have ascertained, as they might easily have done, that the hotel was but recently opened and that the license could have no such value. The value of a hotel is necessarily of a very speculative character, and may, like the property in the case of *Stickney v. Sewell* ⁽¹⁾, arise from accident.

Mr. *Harbin*, one of the trustees, must have known that it could not be worth even £1900, and I suspect that the £800 was thrown in to make up a sufficient value.

It was a security which trustees were not justified in taking, and they have not chosen to give any explanation of how they were induced to make the investment, or how they came to employ a surveyor who was not acquainted with *Broadstairs*. Nor does it appear that there was actual evidence given as to the existence of the lease for £120.

⁽¹⁾ 1 My & Cr., 8.

Upon the whole, it appears to me that the chief clerk, who necessarily has had much experience in these matters, has come to a correct conclusion, and that the decision of the Vice-Chancellor must be reversed. The appellants will have their costs below, but not of the appeal.

SIR G. MELLISH, L.J., concurred.

Solicitor for the appellants: Mr. *G. Cordwell*.

Solicitor for the trustees: Mr. *W. F. Low*.

L.JJ., July 25, 1872.

**In re HATTON.*

723]

[Law Reports, 7 Chancery Appeals, 723.]

Composition — Default in payment of Instalment — Action — Injunction.

Where, by resolutions under the *Bankruptcy Act*, 1869, the creditors agreed to accept a composition payable by instalments, and the debtor made default in payment of an instalment to a creditor:

Held (reversing the decision of the registrar), that the creditor could maintain an action against the debtor for the balance of the whole debt remaining unpaid, and would not be restrained by the Court of Bankruptcy.

GEORGE HATTON, on the 24th of March, 1871, filed his petition for liquidation or composition with his creditors, and at the first meeting of creditors the following resolutions were passed: "1. That a composition of 5s. in the pound shall be accepted in satisfaction of the debts due to the creditors from the said *George Hatton*: 2. That such composition be payable as follows: 2s. 6d. in the pound three months after registration of this resolution, and 2s. 6d. in the pound six months after registration;" which resolutions were duly confirmed and registered.

Messrs. *Hodge & Co.*, as creditors of *Hatton*, assented to the resolutions, and received the first instalment of £5 18s. 9d. on their debt of £47 10s.

The second instalment became due on the 26th of October, 1871, but was not paid, and *Hatton* now alleged that he was unable to pay it. *Hodge & Co.* applied for payment, and on the 30th of April, 1872, commenced an action in the Court of Common Pleas to recover a balance of £45 8s.

Hatton then sent them an order for £5 18s. 9d. as the second instalment, which they refused to receive.

Hatton then obtained from the registrar acting as Chief Judge in bankruptcy an injunction restraining *Hodge & Co.* from proceeding with their action until the further order of the Court.

Hodge & Co. now moved, by way of appeal, to discharge the order granting the injunction.

Mr. *De Gex*, Q.C., and Mr. *Bagley*, for the appellants:

Unless the terms of the composition are observed, the creditor

is restored to his full rights: *Sewell v. Musson* (1); *Edwards v. Coombe* (2).

Mr. Robertson Griffiths, for Hatton :

The creditor ought to proceed in bankruptcy to enforce his rights, whatever they may be, and ought not to harass the debtor and obtain payment in full, to the disadvantage of the other creditors. Sect. 126 of the act of 1869 shows how the creditor ought to proceed. One object of the act was to prevent proceedings in any other Court when once the affairs of the debtor were before the Court of Bankruptcy. *In re Hemingway* (3) is a direct authority *on the point. The original [725 debt is gone by the composition, and the creditor now can only proceed in bankruptcy.

SIR W. M. JAMES, L.J. :

I think that we are bound by the decision of the Court of Common Pleas in *Edwards v. Coombe* (2).

We find, indeed, a decision in *In re Hemingway* which appears

(1) 1 Vern., 210.

(2) Law Rep., 7 C. P., 519.

(3) 1872, March 25. C. J. B.

Ex parte HEMINGWAY.

This was an appeal from an order of the Registrar of the County Court at Leeds restraining the appellant, *Hemingway*, from issuing execution on a judgment obtained by him under the following circumstances :

On the 12th of April, 1871, one *Howard* filed a petition under the arrangement clauses of the *Bankruptcy Act*, 1869. The first meeting of the creditors was duly held, and a resolution was passed accepting a composition of 5s. in the pound, payable one month after registration. On the 19th of May the second meeting of the creditors was held, at which this resolution was confirmed, and it was registered on the following day. At the first meeting *Hemingway* attended by proxy, and tendered a proof for £15 12s. debt, and £1 16s. 6d. costs. The debt was admitted, but the costs were objected to. He also attended the second meeting. No tender of the composition was ever actually made to *Hemingway*, but on or about the 20th of June a circular letter was sent to the unpaid creditors, giving notice that the composition was payable at the office of *Howard's* solicitor, but that if required it would be forwarded by post-office order. The appellant alone of the then unpaid creditors denied having received such circular letter, and on the 5th of

December he entered a plaint in the County Court at Leeds for the amount of the debt admitted by the bankrupt. The County Court Judge gave a verdict for the plaintiff for the full amount, but intimated that the defendant might apply, under the *Bankruptcy Act*, 1869, for an injunction to restrain the plaintiff from recovering under his judgment more than the composition and the costs of the action. The Court, on an application being made, granted the injunction, and made the order now appealed from.

Mr. Bagley, in support of the appeal.

Mr. Robertson Griffiths, *contrá*.

The CHIEF JUDGE was of opinion that the resolution, having been duly passed at meetings which the appellant by his solicitor attended, could not now be called in question, but was binding on all the creditors equally.

As to a tender of the composition not having been actually made, that, under the circumstances, was impracticable, unless the debtor chose to tender more than he admitted to be due, as the amount of the debt was disputed. His Honor thought that the creditor ought to have used the remedies given to him by the Act of 1869, and to have proceeded in the Court of Bankruptcy to recover the composition, and that he had no right to sue at common law for his debt. The appeal must be dismissed with costs.

to be conflicting with that decision, but there were peculiar circumstances in that case which may have had some influence upon the mind of the Chief Judge. Here, however, the question has resolved itself into the simplest form possible. If the debt continues to exist at common law, and it has been decided that the debt does continue so to exist, there is nothing in this case to induce us, as a Court of Equity, or a Court of Bankruptcy, to say that the debt does not exist in this Court.

The Act has provided that a certain majority of the creditors shall have power to bind every creditor to accept a composition, or something less than he is entitled to. In this case the creditor is to accept 5s. in the pound, payable by instalments, at three months and six months. It must be conceded that if this had been an agreement with any individual creditor, that agreement could not be pleaded as accord and satisfaction of the debt unless actual payment of the 3s. *mode et forma* could also be pleaded; and I do not see why we are to suppose any difference between the two cases. It is true that the Act has given not only power to make binding resolutions as to the composition, but power to the creditors to enforce in bankruptcy payment of the composition. That, however, amounts only to a further security, and does not alter the nature of the agreement. If the creditors had intended to make such an alteration, they might have said so. The resolution of the creditors might have provided that giving promissory notes, with or without sureties, should be accepted in discharge of the existing debts, and then the execution of the promissory notes by the debtor and the sureties might be pleaded as accord and satisfaction.

To give any other interpretation to the Act would be to interfere with the general provisions of the Act, and would in fact interfere with the rateable distribution of the assets, instead of 726] *having the contrary effect, as had been argued. It was said that the debtor might then be able to pay half his creditors, and leave the others unpaid, but that is entirely met by the provision at the end of the 126th section, enabling the Court under such circumstances to adjudge the debtor a bankrupt. If the debtor applies great part of his assets in payment of some of his debts, any other creditor, seeing that the debtor would then not be able to pay him, can go to the Court of Bankruptcy and have the debtor adjudged bankrupt, so as to prevent that state of things.

It appears to me that the Court of Common Pleas has decided in accordance with my own view, that the composition must be paid pursuant to the agreement as well as agreed to be paid to give the debtor a valid defence to an action at law; nor is there any defence or any equity in this Court. There may be cases

in which by accident, and not by default of the debtor, the composition is not duly paid, and then no doubt this Court would relieve the debtor from the effect of such an accident, and remove any injustice.

SIR G. MELLISH, L.J.:

I am of the same opinion. At common law, where a body of creditors accept a composition, they may either agree to take the promises of the debtor with or without a surety in satisfaction of the debts or they may agree that payment shall be a condition precedent, and that if the debtor pays the composition at a certain time and place the creditors will accept that composition in satisfaction of their debts. It is a question of construction of the instrument of arrangement, and it is not uncommon for the creditors to accept a promise by the debtor and a surety as a satisfaction of their debts. But where they agree to accept a composition, the debtor is not discharged unless he pays the composition, for that is the only thing which compels him to pay it, and that is the only hold which the creditors have upon him. There is nothing in the Act to alter this state of things. There may be, as in this case, a simple composition which the creditors agree to accept if paid to the day, and there is in my opinion no reason why we should construe these resolutions otherwise.

In a similar case, as I understand it, the Court of Common *Pleas has held that the creditor could maintain his action for the full amount, and there is nothing to induce us in this case to restrain him. The only excuse given by the debtor is that he had not money with which to pay this instalment; but that, under the circumstances, is not a sufficient excuse; and it was not until the action was brought that the composition was tendered.

The order of the registrar must be discharged. The creditors will have their costs below, but not of the appeal.

Solicitor for the Debtor: Mr. J. T. Moss.

Solicitor for the Creditors: Mr. G. D. Webb.

L. JJ. July 27, 1872

In re WARD'S TRUSTS.

[Law Reports, 7 Chancery Appeals, 727.]

Failure of Purpose of Gift—Settlement—Advancement—Abolition of Purchase of Commissions in Army—Regulation of Forces Act, 1871 (34 & 35 Vict. c. 86).

By a separation deed a sum of money was directed to be held by trustees upon trust for the wife for life, and after her death, as to four-sixth parts thereof, for F. W., one of the children of the marriage, who was then an officer in the army,

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In re Ward's Trusts.

L. JJ.

during his life, and after his death for his children. And it was declared that it should be lawful for the trustees, if in their discretion they should think fit, to apply any portion of the fund, not exceeding £2000, in or towards affecting the promotion of *F. W.* in the army. The trustees applied £850 in the way pointed out by the deed, but in consequence of the abolition of purchase of commissions in the army, under the royal warrant of the 20th of July, 1871, no further sum could be applied for the same purpose:

Held, that the purpose for which the power was given to the trustees having failed, the residue of the sum of £2000 could not be raised and applied in any manner for the benefit of *F. W.*

Palmer v. Fowler (1) distinguished.

THIS petition was heard in the first instance by the Lords Justices at the request of the master of the rolls.

On the 24th of March, 1869, a deed of separation was executed by Mr. *Frederick Ward* the elder and *Jane* his wife. By this deed, after reciting, among other things, that Mr. and Mrs. *Ward* had five children, of whom *Frederick Ward* the younger was one, it was declared that the two trustees of the indenture 728] should stand *possessed of a sum of £10,969, which had been paid to them, upon trust to invest the same and to pay the income thereof to Mrs. *Ward* during her life for her separate use, and after her death, as to four-sixths of the trust fund, upon trust to pay the income to *Frederick Ward* the younger for his life, and after his death upon trust for the children of *Frederick Ward* the younger as he should by deed or will appoint, and in default of appointment upon trust for the children who, being sons, should attain twenty-one, or being daughters, should attain that age or marry, in equal shares; and in default of children, for his sisters *Caroline Nott* and *Frances Ward* and their respective children as therein mentioned. And the indenture contained a proviso that it should be lawful for the trustees or trustee for the time being, if he or they should in their or his discretion see fit (and they or he should be under no fiduciary obligation as to the exercise of such discretion), at any time or times while the said *Frederick Ward* the younger should continue to hold a commission in Her Majesty's army, by and out of the said four-sixth parts, to raise any sum or sums not exceeding in the whole the sum of £2000, and to apply such sum or sums in or towards the purchase of or affecting his promotion in Her Majesty's army; but it was provided that no sum should, during the life of Mrs. *Ward*, be raised for that purpose without her consent in writing, and that in that case *Frederick Ward* the younger should by his bond secure her an annual sum during her life equal to £5 per cent. on the sum so raised.

In July, 1869, the trustees applied £850, part of the sum of £10,969, with the consent of Mrs. *Ward*, in affecting the promotion of *Frederick Ward* the younger to the rank of lieutenant

(1) *Law Rep.*, 13 Eq., 250; 1 *Eng. Rep.*, 664.

in the army, and he executed a bond as required by the separation deed.

By a royal warrant of the 20th of July, 1871, and by the *Regulation of the Forces Act*, 1871 (34 & 35 Vict. v. 86), the purchase of commissions in the army was abolished, and it therefore became impossible to apply any further portion of the sum of £2000 in that way.

The trustees accordingly presented a petition, under the 22 & 23 Vict. c. 35, asking for the advice and direction of the Court whether they might safely pay the sum of £1150, being the balance of the sum of £2000, to *Frederick Ward* the younger, or whether they might exercise the power of advancement [729 in any other way for his benefit.

The petition was presented in the Court of the Master of the Rolls, but, at his request, was heard by the Lords Justices.

All the members of the family who were adult consented to the application.

Mr. *Waller*, for the Petitioners, referred to *Palmer v. Flower* ⁽¹⁾, where Vice-Chancellor *Bacon* directed a sum of £6500, which trustees were empowered by a testator to raise for procuring the promotion of his nephew in the army, to be paid to him absolutely, under similar circumstances to those under which the present difficulty had arisen. The only distinction between that case and the present was that this case arose on a deed *inter vivos* instead of a will. But as it was a settlement for the benefit of the family, and *F. Ward* the younger was one of the objects of the settler's bounty, for whom a provision was intended, the same principle would apply. It was a circumstance to be considered that he was in the army at the time when the deed was executed; if he had not been the provision for his advancement would probably have been more general. He also referred to *Leche v. Lord Kilmorey* ⁽²⁾, *Barlow v. Grant* ⁽³⁾, and *Cope v. Wilmot* ⁽⁴⁾.

Mr. *S. Dickinson*, for Mr. *F. Ward* the younger and his mother and sisters.

Mr. *Streeten*, for Mr. *F. Ward* the elder.

Mr. *Bunting*, for the infant children of *Caroline Nott*, offered no opposition.

SIR W. M. JAMES, L.J. :

This is not an absolute gift, it is only a discretionary power to advance money for the benefit of the son in one particular direction. I think the case is not governed by *Palmer v. Flower*. That was a case of a will, and the Vice-Chancellor proceeded on the expressed intention of "making a provision for the advance-

⁽¹⁾ Law Rep. 18 Eq., 250.

⁽²⁾ T. & R., 207.

⁽³⁾ 1 Vern., 255.

⁽⁴⁾ 1 Coll., 390, n.

ment" of his nephew. Here there is a deed between parties, and we must be guided by the express words. If the way of applying the money, which was legal at the date of the deed had continued to be legal, it might have been applied in that way. As the law now stands Mr. Ward gets his promotion without the payment of money, and the fund cannot be applied.

SIR G. MELLISH, L.J., concurred.

Solicitors: Messrs. Newbon & Co.; Mr. J. J. Darley.

LJJ. July 23, 24, 31, 1872.

733]

*MERRY v. NICKALLS.

[Law Reports, 7 Chancery Appeals, 733].

[1869 M., 125].

Custom of Stock Exchange—Sale of Shares—Infant Transferee—Liability of Jobber

The plaintiff, through his stockbroker, contracted with the defendant, a jobber on the *Stock Exchange*, for the sale of fifty shares in a company. On the name day the defendant gave in to the plaintiff's brokers a ticket with the name of *L.* as the intended purchaser, which had been passed to him by another jobber. A transfer to *L.* was accordingly executed by the plaintiff; but it was afterwards discovered that *L.* was an infant, and the transfer was never registered. In a suit by the plaintiff against the defendant for an indemnity against calls: 734] *Held* (reversing the decision of *Bacon*, V.C.), that the defendant, not *having given the name of a transferee who was capable of accepting the transfer, was not discharged from liability, although the ten days limited by the rules of the *Stock Exchange* for objecting to a proposed transferee had expired before the execution of the transfer.

Marted v. Paine (1st action) (*) approved.

Rennie v. Morris (2) overruled.

Observations on the judgment of *Blackburn, J.*, in *Marted v. Paine* (2nd action) (2).

In sales of shares on the *Stock Exchange* the ultimate contract is not between the vendor's broker and the purchaser's broker, but between the vendor and the purchaser named on the ticket, who are brought together by means of the jobber; and therefore, until a person is named who is capable of contracting, and who has given authority for the use of his name, the jobber is not discharged from liability to the vendor (*).

This was an appeal from a decree of Vice-Chancellor *Bacon* dismissing the plaintiff's bill.

On or shortly before the 11th of July, 1865, *William Lucas Merry*, being the registered owner of fifty shares in the *General Estates Company, Limited*, instructed Mr. *George Burnand*, of the *Stock Exchange*, a member of a firm of stockbrokers, to sell the shares for him; and on the 11th of July, 1865, *Burnand* entered into a verbal agreement with a Mr. *Putteson Nickalls*, a stock-jobber, also a member of the *Exchange*, for the sale to *Nickalls* of fifty shares (which were of the nominal value of £20, £2 having been paid up) at a premium of £2 a share, making, with the

(*) Law Rep. 4 Ex., 81.

(2) Law Rep. 6 Ex., 132.

(2) 1 Eng. Rep. 651; Law Rep. 13 Eq. 203.

(*) This case is pending in the House of Lords. 21 Weekly Reporter, 305.

£2 already paid up, the sum of £4 a share; the purchase to be completed on the 1st of September following.

A few days afterwards *Nickalls* sold fifty shares in the same company to a Mr. *Baker*, another member of the *Exchange*, who a few days previously had sold a like number of similar shares to Mr. *Allen*, a broker, who was also a member.

On the 31st of August, which was the "name" day, *Allen* passed to *Baker*, who passed to *Nickalls*, the name of *Edward Richard Lloyd* as the purchaser of the shares; the purchase-money was paid, and a transfer of *Merry's* fifty shares to *Lloyd* was executed by *Merry*, and by *Nickalls'* direction was handed to *Allen*.

It appeared from the evidence that *Allen* acted as the broker of Mr. *J. C. Hodges*, the manager of the company, by whose instructions he passed the name of *Lloyd*.

On the 27th of November, 1866, an order was made for winding up the company, and about the same time the plaintiff discovered that the transfer had not been registered, and consequently that his name was still on the register, and that *Lloyd* was an infant.

On the 9th of July, 1868, a call of £12 a share, making £906 was made upon *Merry*, who, on the 27th of April, 1869, filed the present bill against *Nickalls*.

The plaintiff alleged that, "according to the usage and practice of the *Stock Exchange*, a stock jobber who has entered into an agreement for the purchase of shares in a company is bound either to nominate by the day fixed for the completion of the purchase, a bona fide transferee of such shares capable of effectually accepting the transfer thereof, or to accept a transfer thereof into his own name;" and prayed for a declaration that the defendant was bound specifically to perform the contract entered into by him for the purchase of the shares, and to indemnify the plaintiff against all liability in respect thereof.

On the 14th of March, 1870, the defendant filed an answer, in which, as well as in his affidavit, he made statements to the following effect:

According to the rules and usage of the *Stock Exchange* its members deal with one another as principals, whether they act as brokers or not, the persons outside who employ members as brokers are not recognized as parties to any transactions between members. For the convenience of business, there has grown up a distinction between brokers and jobbers. The business of a jobber is to bring together buyers and sellers, or, in other words, to make a ready market. When a broker is instructed by his principal to sell shares on the *Exchange*, he applies to a jobber to make a price for the class of shares in question, with-

out saying whether he desires to sell or buy, and the jobber thereupon names two prices; the lower being his price to buy, and the higher his price to sell, but in either case it is always implied and understood that such buying or selling on the part of the jobber is to be subject to the rules and usage of the *Exchange*. According to these rules, if the broker agrees to sell, 736] the sale is for a certain specified day called *the "account day," which is fixed by the committee of the *Exchange*. In the case supposed, where the jobber stands as purchaser, he is bound on the day preceding the account day, usually called the "name day," to pass to the broker the name of a person as the purchaser, of the shares: or he may, if he pleases, pass his own name as such purchaser, in which latter case only is he bound himself to take to the shares. If the jobber fails to procure such purchaser by the name day, the selling broker can sell out the shares against him, and compel him to pay any loss thereon. Until the name day, it is not seen who may stand ultimately either as purchaser or seller; in other words, who are to be the parties to the transfer; and until then a jobber may have had a great many transactions of buying and selling with the same or with various brokers or jobbers; there being in every transaction, until the name day, the right on both sides to find a new name either as purchaser or seller. On the name day, in the case supposed, if the jobber having purchased has sold again, a ticket with the name of the ultimate purchaser on it will have been issued by and passed on from the ultimate purchasing broker to his seller, and so on through all the intermediate sellers and buyers, until it reaches the hands of the original selling broker. Every member passing a ticket is required to write on it the name of the member to whom it is passed. Such ticket will also have contained the amount of purchase money agreed to be given by the ultimate purchasing broker, and also a note that he will pay the same. So many transactions of this kind take place during the account, that on the name day the ticket remains in the hands of an intermediate jobber only for the space of time necessary for taking the particulars of it. Sometimes the same ticket passes through the same member's hands several times, he having neither the opportunity, time, nor means to make inquiries respecting the name so passed. Tickets sometimes have the names of more than a hundred members indorsed on them. The original selling broker is not bound to deliver a transfer of the shares to the ultimate purchasing broker until the expiration of ten days after the account day, and during these ten days the purchasing broker cannot buy in the shares against the seller. During this time it is open to the original selling broker to ob- 737] ject *to the name passed by his buyer, in which case the

buyer passes on the objection to the person from whom he received the name, and practically such buyer has no liability or interest in the matter, as whatever grounds there may be for objecting to the name they must be met by the person from whom the name emanates, and who originally issues the ticket. The committee of the *Stock Exchange* will, in such a case, if appealed to by the selling broker, decide as to the validity of such objection, and will, if they think it right, require another name to be given. But after the lapse of these ten days, the selling broker is required to deliver the certificates and transfer of the shares to the ultimate purchasing broker, or in default, the latter can buy in the shares against the seller. After the transfer has been executed, the committee will not consider any objection laid before them, except on the ground of fraud. The usual course of business is for the selling broker to deliver the transfer, together with the corresponding ticket, to the ultimate purchasing broker, from whom he is to receive the purchase money. The ultimate purchasing broker does not know to whom his ticket has been ultimately passed until the delivery of the transfer. According to the long established rules and usage of the *Exchange*, if the original selling broker does not deliver his transfer and certificates, and obtain payment of the purchase money within fifteen days from the "name day," the immediate buyer is released from all loss occasioned by the default of the ultimate purchasing broker to pay for the same; and the latter alone remains responsible. In like manner, if the member who issues the ticket containing the name of the intended transferee does not buy in or attempt to buy in the shares within fifteen days from the "account day," his immediate seller is released from all loss caused by the failure of any member through whose default the shares are not delivered. Subject as aforesaid, when the deed of transfer has been delivered to and the purchase money paid by the ultimate purchasing broker, the jobber has fulfilled all the obligations required of him by the rules and usage of the *Stock Exchange*. In an ordinary transaction he is not held liable for the non-registration of the transfer. If the selling broker wishes to secure the registration of the transfer, or the exoneration of his principal from all future liability, he makes a special bargain with the jobber in express terms. The [738 consideration expressed in the transfer is required to be the consideration specified in the ticket so passed, and the broker whose ticket is so passed, is bound to pay the amount of such consideration to the person who produces the ticket, on such person handing to the broker the certificates and transfer. If there are any differences between the prices for which the shares have been sold and purchased, such differences are settled in

account on the account day by the several members who have sold and purchased, without waiting for the completion of the transfer. The holder of the ticket who is to deliver the shares, and the issuer of the ticket who is to take them, complete the transaction without communicating with the intermediate parties. The holder and issuer may continue the transaction to the next account, or close the bargain by purchase and sale, without consulting the intermediate parties. In cases where a member of the *Exchange* has contracted to sell shares, all of which have not been purchased from the same person, he retains the original ticket passed to him, and passes separate tickets to the several persons from whom he purchases the shares; the name of the transferee and the amount per share named in the subdivided or split ticket being the same as in the original ticket; and in cases where a member who has contracted to buy shares does not sell them all to the same person, he is entitled to one or more tickets from each person to whom he has sold in respect of the particular shares so sold to that person.

The defendant also alleged that if within ten days from the 1st of September the plaintiff had objected to the name of *Lloyd* on the ground of his being an infant, the committee of the *Stock Exchange* would have entertained such objection, and would, if they had found it valid, have compelled *Allen* to pass another name; and submitted that, as ten days from the 1st of September, 1865, had been allowed to elapse without any such objection being taken, he (the defendant) was thenceforward subject to no liability.

Mr. *Cupper*, a stockbroker, a witness for the plaintiff, deposed that, according to the custom and usage of the *Stock Exchange* as they existed in July and September, 1865, a stockjobber who entered into an agreement for the purchase of shares in a company was bound either to nominate, by the day fixed for the 739] *completion of the purchase, a transferee of such shares "capable of effectually accepting and willing to accept the transfer thereof," or to accept a transfer thereof into his own name. He denied the statement in the answer that after the transfer has been executed the committee of the *Stock Exchange* will not consider any objection except in cases of fraud, and brought forward an instance which had occurred in his own experience to the contrary. In February, 1865, he sold fifty shares in a company on the *Exchange*, and the name of *Richard Amery* was passed to him. The transfer from him to *Amery* was executed and the transfer registered, after which it was found that *Amery* was an infant, whereupon the deponent was placed on the list of contributories. The committee of the *Stock Exchange*, although there was no suggestion of fraud, entertained the case,

and decided that "the broker who had passed the name" of *Amery* was bound to indemnify the deponent, and accordingly the broker paid to deponent the amount of the calls which had been made upon him. Afterwards, in proceedings in Chancery, the Master of the Rolls decided against the deponent, and the deponent's petition of appeal was dismissed with costs.

In reply, the defendant filed an affidavit, in which he said that the decision of the committee, directing the broker to indemnify Mr. *Capper*, was in accordance with the rules and usages of the *Exchange*, it having then been the practice of the committee, in cases where shares had been transferred into the name of a minor or of some other person to whom reasonable objection had been established, to hold that the member who issued the ticket with such name should be liable to indemnify the transferor; but since the recent decisions of the Court of Chancery, holding the real buyer liable to indemnify the transferor, the committee had ceased to hold the broker responsible in such cases, and had left the transferor to his legal remedies against the transferee or the real buyer. The committee had never, after delivery of the deed of transfer and certificates, and payment of the purchase money, held a jobber, or other member occupying the position of a middleman between the transferor and the transferee, liable to indemnify the transferor in respect of calls made upon shares the subject-matter of the dealing.

*The evidence of the defendant as to the rules and re-^[740]gulations and the usage of the *Stock Exchange* was supported by the testimony of Mr. *De Zoete*, deputy chairman of the committee, and by Mr. *Underhill*, a member of the *Stock Exchange*, who stated their opinion that if the name on the ticket be accepted by the transferor, and a transfer made, the jobber is discharged, even though the name may turn out to have been given without authority.

Mr. *Tutham*, a broker also, made an affidavit in reply to Mr. *Capper's* evidence.

In the course of the argument reference was made to the printed rules of the *Exchange*, which are issued to the members from time to time. These rules, as they existed at that date, are given at the end of the report of *Grissell v. Bristowe* ⁽¹⁾.

The Vice-Chancellor held that the defendant, having furnished a name which had not been objected to within ten days, was discharged from liability, and dismissed the bill ⁽²⁾. From this decision the plaintiff appealed.

⁽¹⁾ Law Rep., 4 C. P., 53.

⁽²⁾ 1872, March 20.

SIR JAMES BACON, V.C.:

It has been said, no doubt with great truth, that the question raised in this

case is a very important one. Important it is to the parties concerned, as all cases are; but it is very important also in a general point of view, because it relates to transactions of great multi.

1872

Merry v. Nickalls.

L. JJ.

Mr. *Eddis*, Q.C., and Mr. *Davey*, for the appellant :

The Vice-Chancellor followed the authority of *Rennie v. Morris* (!); but that decision is inconsistent both with principle

and enormous amount upon the *Stock Exchange*. It has engaged the attention of various Courts on various occasions. The particular cases submitted to the Courts have been referred to as the authorities on either side in the course of the present argument.

But of all these cases, that which has been last mentioned, *Rennie v. Morris* (Law Rep., 13 Eq. 203), is the only one which seems to me to have any direct application to the present. The facts, it is admitted, are exactly the same in both cases—the law therefore ought to be the same. If I had found that the cases at common law were directly at variance with the decision in *Rennie v. Morris*, then I should have been obliged to pause before I decided to which side I would adhere—whether I would adopt the principle of the common law cases, or whether I would follow the decision of the Master of the Rolls. I do not find any such diversity; but I do find that the Master of the Rolls came to the conclusion which is expressed in his judgment upon principles and upon law which were not adverted to in any of the cases at common law.

The Master of the Rolls found, as a matter of fact clearly proved before him, that there was a rule and a practice, amounting to a law, on the *Stock Exchange* by which the dealers on the *Stock Exchange*, brokers and jobbers, are equally bound; and that the effect of that law was, that if a jobber enters into a contract, it is to be executed according to the forms and rules which are there prevalent; that the parties entering into the contract must be taken to have known these rules, and must be taken to be bound by them. I cannot depart from that principle. The evidence in that case and the evidence in this case as to the law on the *Stock Exchange* are exactly the same. The master of the rolls in his judgment points out very clearly indeed the ground upon which he proceeds. At page 208 the usage is thus shortly stated by the master of the rolls:

"The seller, through his broker, applies to the jobber who bought from his

broker, and the jobber who bought refers to the broker who bought from him. The broker, when so applied to, either gives up the name of his principal, that is, the person who instructed him to buy, or he refuses so to do." The Master of the Rolls then goes through the facts of that case, tracing the several purchasers who had given the names of their principals, and then comes to Mr. *Lancashire*, who declined to do so; and then points out the course which the plaintiff, in pursuit of his real remedy, might have pursued, namely, that of attacking Mr. *Lancashire*, who refused to give up the name of his principal. That means that Mr. *Lancashire's* principal was the person liable, and not the defendant in the suit. His Lordship adds: "In no case, in my opinion, is any one of the intermediate purchasers, who tell all they know, liable to the plaintiff. Were a different course to be adopted, and were this Court to make the person who entered into the immediate contract liable, it is clear that the matter would give rise to as many suits as there were jobbers in the transaction; and so in every *Stock Exchange* transaction every jobber would be liable to his vendor *toties quoties*, until at last you got to the ultimate broker, and from him to the person who employed him." He adds: "The usage of the *Stock Exchange* very properly obviates this necessity; and as it is clear that the person who is the real purchaser, and gave the first instructions, would be ultimately liable, it puts an end to the multiplicity of suits brought to make each person liable to his vendor. Such a course would be wholly opposed to the real principles of equity, which aims at shortening litigation; and on the same principle the custom jumps over the heads of the innocent persons, and makes the real delinquent the person primarily and exclusively liable."

The cases which have been referred to, most of which, be it observed, were decided in favor of the jobber, notwithstanding the observations which have been made upon *Coles v. Bristol* (Law Rep., 4 Ch. 3), and *Grissell v.*

*and authority, and this Court will not hold itself bound [742] by it. The law has been settled by a current of authorities since the customs of the *Stock Exchange* came to be discussed in Courts of Law and Equity.

Bristow (Law Rep., 4 C.P., 36), do not touch that which is put prominently forward in the answer and in the evidence, as the defendant's case here. After stating at full length what he conceives to be the rules of the *Stock Exchange*, which are in evidence, and clearly proved to be the existing rules and laws binding the members of this community called the *Stock Exchange*, the defendant gives in detail the dealings which he had with these shares. It is unnecessary, perhaps, to observe that he is a jobber who buys upon the terms there agreed upon, namely, that he should at the settlement day complete his purchase after the ten days within which the shares are to be delivered. As a jobber, of course he did not mean to keep these shares. That may be readily assumed. He bought them that he might deal with them for his own benefit, and he says that he dealt with them thus: first, "I dealt with Mr. Burnand as a principal, and not as an agent. The dealing, although it may be called a purchase, was in reality, as hereinbefore explained" (that is, in the passage of the answer which states the rules of the *Stock Exchange*) "a contract in accordance with the said rules. I did not know that he was acting as the agent of the plaintiff; it being one of the rules of the said *Stock Exchange*, as is hereinbefore mentioned, that the members thereof do not recognize in their dealings any other persons than themselves. The dealing had reference to no specific shares, but to any fifty shares of the said company. Mr. Burnand was bound by his contract to provide by the account day, not necessarily the fifty shares mentioned in the plaintiff's bill, but any fifty shares whatever of the said company. The dealing, though it may be called a purchase, was in reality, as hereinbefore explained, a contract, in accordance with the said rules and usage, on my part to pass to the said Mr. Burnand, on the name day for the next account, a name as purchaser, and to pay the said price; and on Mr. Burnand's part to hand over thereupon the certificates

of the said shares, and to pass a transfer thereof within the ten days aforesaid. Subsequently I sold (using the term 'sold' with reference to the ordinary transactions hereinbefore explained in accordance with the said rules and usage) fifty shares, but not any specific shares of the said company, to Mr. Baker, a member of the said *Stock Exchange*—at a price which he mentions. "On the 8th of July, 1865, Mr. Baker sold fifty shares of the said company to Mr. Allen, a broker and member of the said *Stock Exchange*, at a premium of £3 10s. per share. The said Mr. Allen alleges that he acted in this transaction as the broker or agent of Mr. James Clifford Hodges, who was at that time the manager of the said company, and it appears that Mr. Hodges instructed Mr. Allen that the transfer was to be made into the name of Edward Richard Lloyd, in the plaintiff's bill named as being the person on whose behalf the purchase was made. Accordingly, on the name day, the 31st of August, 1865, Mr. Allen passed on to Mr. Baker a ticket with the name of the said Edward Richard Lloyd thereon, as being the person to whom the shares were to be transferred. Mr. Baker passed this ticket on to me, and I passed it on to Mr. Burnand. The 1st of September, 1865, and not the 5th of September, 1865, was the day fixed for the special settlement of transactions in shares of the said company; no previous settling day having been appointed. For ten days after the said 1st of September, 1865, it was, as hereinbefore explained, open to the plaintiff to object to the said name of Edward Richard Lloyd. If the said Edward Richard Lloyd were at the time, as the plaintiff alleges, an infant, that would, no doubt, have been a valid objection, and one which the committee of the *Stock Exchange* would have allowed, and the consequence would be that the said Mr. Allen (assuming that he was, as I believe in fact he was, the person from whom the said name emanated) would have been compelled to pass another name to which no objection could be taken; and, in effect, I should have had

743] According to the custom of the *Stock Exchange* the original vendor of shares, through his broker, contracts with a jobber that the jobber will either purchase the shares himself

no responsibility, risk, or trouble in the matter, which would thus have been disposed of between the ultimate and actual buyer and seller, so brought together by means of my intervention." I believe that is all that is necessary to refer to from the answer.

Then the evidence of the deputy chairman of the *Stock Exchange* is perfectly conclusive, and establishes the case beyond any doubt. He has been cross-examined; but I do not see that it would be useful to refer to any part of that cross-examination. He proves the practice of the *Stock Exchange* to be, that the successive buyers, the brokers, to whom, in this case, the defendant *Nickalls* sold, from time to time, as they become purchasers, pass on the name to their immediate vendors, and so, in this case, the name ultimately came to the jobber *Nickalls*, who had to hand the name over to Mr. *Burnard*, the broker for the plaintiff. All that seems to have been done with the utmost regularity. The money was paid; the transfer was executed; the shares delivered; and the matter was thereupon concluded.

But then it is said that inasmuch as the name which was upon the ticket is the name of an infant who was incapable of entering into any contract, the contract between the plaintiff and the defendant is not performed, and that it is as much a sham as if it were an imaginary name. That would be true if the transaction could be severed from the custom of the *Stock Exchange*, if it were a transaction relating to some other things than these which are the subject of the present suit. The buyer who undertakes to pay the money and to provide a name, does not satisfy the obligation he comes under, unless he not only pays the money but furnishes a proper name; and if that were incumbent on Mr. *Nickalls*, it cannot be said in this case that he has acquitted himself of that obligation.

But that is not the contract between the parties, as the evidence proves. The contract is: "I will pay you a sum of money; in consideration of that promise I shall deal with these shares as I think fit between this and the next settling day; if on that day I have not

sold them, I will pay you the money or give you a name on my own responsibility; but if in the meantime I sell and they are sold again to a dozen or a hundred different people, you shall be satisfied if I bring you the broker's ticket, with a name upon it, because I shall thereby have shifted the responsibility from myself; I shall have done all which it is incumbent upon me to do when I give you the name of a broker; I give you the name of a man whom the committee of the *Stock Exchange* will make answerable to perform that term of the agreement which, if I had not parted with the shares, I should have been bound to perform, but with which, having parted with them, and furnished you with the broker's certificate and the name, I have nothing further to do."

Nor is there anything unreasonable or unjust in that mode of looking at the contract. The plaintiff sustains a grievous loss by the fact of an infant's name being substituted as the transferee; but he is not without remedy. The evidence of Mr. *De Zoete* in the 5th paragraph of his affidavit is this: "If the selling broker had discovered that the name passed to him was that of a minor or person under disability, such as a married woman or lunatic, and within the said ten days and before delivery of the transfer had objected to such name, he could have called upon the jobber to furnish him with another name, who, in his turn, could have called upon the ultimate purchasing broker to do the same; and if the latter had failed to do so, the said selling broker might have appealed to the committee, who, if such fact had been established, would have ordered the said ultimate purchasing broker to furnish a name to which the above objections would not have been applicable." Then he says in the 6th paragraph: "In like manner, if the name of the proposed transferee had proved to have been that of a servant or person in needy circumstances, and a mere nominee of the real buyer, which the latter had passed or directed to be passed for the purpose of evading liability, the committee, on appeal within the ten days, and before the delivery of the transfer would have directed the said ultimate

or supply the *name of a purchaser who will purchase [744 them; but if the person whose name is supplied is not capable of contracting, or has given no authority for the use of his name, it is the same as if no name *had been given, and the [745 jobber is still liable. Here the name given was that of an infant, who had no power to contract or give authority to use his name. All the cases are consistent with this principle. In

purchasing broker to furnish another name." So that the remedy seems to be clear under the laws which bind the plaintiff and the defendant. As to the ten days, the evidence of Mr. *Capper* shows that that sort of equitable jurisdiction which the committee of the *Stock Exchange* exercises over its members is not limited to ten days, although ten days are here referred to in a somewhat indistinct way. If I am to be guided by what appears to have been affirmed in *Rennie v. Morris* (Law Rep. 13 Eq., 208), it rather refers to that period of ten or fifteen days within which the selling broker may buy in as against the man who has failed to complete his contract.

But, clearly, he is not without remedy. It is not a case in which a man enters into a contract which is broken by the other party, and which leaves the seller entirely without relief. Here is a clear remedy which might have been resorted to by the plaintiff with the greatest readiness. Instead of taking that remedy, what he prefers is to file a bill in this Court, and to make his claim, supporting that claim by an argument which would perhaps be justifiable on general principles, and quite in accordance with the common law cases. But because the jobber to whom he sold has failed to perform perhaps the most important consequence of the contract, which is clearly of much greater importance than the mere price of the shares, that the plaintiff can, thereupon, upon the general principles and doctrines of equity, claim from that jobber the performance of a contract which never entered into the minds of either of them as being to be performed by the jobber, except only in one case, that of the jobber keeping the shares until the settling day—cannot be supported. If he had done that, then of course he would have been personally liable to perform both the terms of the contract.

I cannot think, therefore, that I

should be doing right in departing in the slightest degree from the judgment of the Master of the Rolls in the case of *Rennie v. Morris* (Law Rep., 13 Eq., 203). The cases are identical. The evidence given in each case, as far as I know from the description of what was the evidence in the case before the Master of the Rolls, is the same. The evidence before me is clear and distinct—establishing this practice on the *Stock Exchange*, which I am bound to adopt as the plain law between the parties here litigant.

I think I have pointed out that the defendant has in no way failed to perform all that it was incumbent upon him to perform towards the vendor, and that, therefore, there is no ground whatever for the claim which is made to hold the jobber liable for the consequences of the name of the infant having been used in this contract, unknown to the vendor, and unknown, as I must believe on the evidence, to the jobber. It is not suggested that there was any fraud, misrepresentation, or wilful doing of wrong. I believe what is stated that the plaintiff was not without a remedy, easier, more rapid, and less expensive than he could have had in this Court. If that has failed him, it can only be through the lapse of time that it has failed, because, by some rule which I know nothing about, the *Stock Exchange* would not now entertain a complaint which, in its origin, would have been a perfectly good complaint—not against Mr. *Nickalls*, for he has done all that it was incumbent upon him to do, but against the last broker *Allen*, who had brought in the name of Mr. *Hodges*, who had been connected with the wrongful act of inserting the name of an infant in that transfer of shares which the infant was not capable either of accepting or of performing the obligation of. I am therefore of opinion that the plaintiff's bill must be dismissed, but without costs.

Grissell v. Bristowe ⁽¹⁾ the Court of Exchequer decided in favor of the jobber; but it was stated that the usage was that the substituted person must be "one who was able and willing to perform the contract ⁽²⁾." In *Coles v. Bristowe* ⁽³⁾ Lord Cairns repudiated the doctrine that the jobber was released from liability "whether the name supplied was objectionable or unobjectionable, whether the person denoted did or did not accept the shares ⁽⁴⁾." In *Cruse v. Paine* ⁽⁵⁾ the jobber was held liable because the purchaser, 746] although he executed the transfer, did not *get it registered. In *Maxted v. Paine* (1st action) ⁽⁶⁾ the jobber having supplied the name of a person who had given no authority for the use of his name, was held liable. That case really governs the present. *Allen v. Graves* ⁽⁷⁾, *Bowring v. Shepherd* ⁽⁸⁾, and *Paine v. Hutchinson* ⁽⁹⁾ are also in our favor. In *Maxted v. Paine* (2d action) ⁽¹⁰⁾ the jobber was held to be discharged; but in that case the person named, although a man of straw, was capable of executing the transfer.

The ten days' rule has no application to this case. There is no evidence to show that the committee of the *Stock Exchange* has ever entertained a case of this kind within the ten days, or refused to entertain it after that period. All that the witnesses depose to is as to what, in their opinion, the committee would do. Mr. *Capper* refers to a case in which the committee did entertain an application after the ten days' period had elapsed.

Mr. *Higgins*, Q.C., and Mr. *Buchanan*, for the defendant:

The case is covered by authority. In *Rennie v. Morris* ⁽¹¹⁾ the Master of the Rolls only followed the opinions of the majority of the judges in *Maxted v. Paine* (2d action). It is remarkable that both in law and in equity the decisions of the Courts of first instance were against the jobber. In *Coles v. Bristowe* ⁽¹²⁾, *Grissell v. Bristowe* ⁽¹³⁾, and *Sheppard v. Murphy* ⁽¹⁴⁾, it was held that the jobber could not discharge himself unless the vendor accepted the name he gave; but in each case the Courts of Appeal held a different view, and the result of the decisions is, that if a jobber passes a name, and no objection is made within the ten days allowed by the custom, the jobber is discharged.

The basis of the usages of the *Stock Exchange* is that the members deal with one another in all contracts as principals. Brokers and jobbers are alike members of the *Exchange*, and are all bound by this rule. This principle is clearly worked out in Mr.

⁽¹⁾ Law Rep., 4 C. P., 36.

⁽²⁾ Ibid., 47.

⁽³⁾ Law Rep., 4 Ch., 3.

⁽⁴⁾ Ibid., 11.

⁽⁵⁾ Ibid., 441.

⁽⁶⁾ Law Rep., 4 Ex., 81.

⁽⁷⁾ Ibid., 5 Q. B., 478.

⁽⁸⁾ Ibid., 6 Q. B., 309.

⁽⁹⁾ Ibid., 3 Ch., 388.

⁽¹⁰⁾ Law Rep., 6 Ex., 133.

⁽¹¹⁾ Ibid., 13 Eq., 203.

⁽¹²⁾ Ibid., 6 Eq., 149.

⁽¹³⁾ Ibid., 3 C. P., 112.

⁽¹⁴⁾ Ir. L. Rep., 1 Eq., 590.

Justice *Blackburn's* judgment in *Maxted v. Paine* (2d action). The result is that the ultimate contract is not between the owner *of the shares and the person whose name is on the ticket, [747 but between the vendor's broker and the broker who produces the ticket; and all that is necessary for the discharge of the jobber is that he can shew that a name has been passed by some broker who is a member of the house, and has not been objected to within ten days by the vendor. The contract being with the broker, it can make no difference whether the name which he passed is that of a person who is able to accept the transfer or not. He may be liable himself to the vendor, but the intermediate jobbers are discharged. The decision in *Maxted v. Paine* (1st action) (1) is not applicable, for in that case there was a special contract that registration should be guaranteed.

Again, although in the present case the name on the ticket was that of an infant, there was a real purchaser behind, namely, *Hodges*; and if the vendor cannot hold the purchaser's broker liable for passing the name of an infant, which he might probably do, he can proceed against the real purchaser of the shares for an indemnity: *Castellan v. Hobson* (2); *Stikeman v. Dawson* (3); *Nelson v. Stocker* (4); *Shepherd v. Gillespie* (5); *Duncan v. Hill* (6); *Weston's v. Case* (7).

Mr. *Eddis*, in reply.

July 31. SIR W. M. JAMES, L.J.:

In this case a very short point is raised for our decision, namely, whether the cases of *Coles v. Bristowe* (8) and *Grissell v. Bristowe* (9) extend to cover the case of a jobber who has given in the name of an infant as the ultimate purchaser to whom the transfer is to be made. There is really no dispute as to the facts of the case.

The plaintiff, through his broker on the *Stock Exchange*, entered into a contract with a jobber on the *Stock Exchange* for the sale of his, the plaintiff's shares in a joint stock company. *There is no doubt there was a contract made with the [748 jobber by which the jobber was bound. The contract was to be fulfilled on a certain day, according to the custom and practice on the *Stock Exchange*. In the meantime the jobber had sold the shares, and there had been one or two subsequent sales, and on the day when the contract had to be completed the jobber handed in to the plaintiff's broker the name of a transferee, that name having reached the jobber's hands from a person who was

(1) Law Rep. 4 Ex., 81.

(2) Ibid 10 Eq., 47.

(3) 1 De G. & Sm., 90.

(4) 4 De G. & J., 458.

(5) Law Rep. 5 Eq., 293.

(6) Ibid 6 Ex., 255.

(7) Ibid 5 Ch., 614.

(8) Ibid 4 Ch., 3.

(9) Law Rep., 4 C. P., 38.

the broker of the ultimate purchaser of the shares. Thereupon the broker accepted that name, and the transfer was executed by the plaintiff to the person named as transferee. It turned out that that person was an infant.

Now the Master of the Rolls has held, in the case of *Rennie v. Morris* ⁽¹⁾, which the Vice Chancellor has followed on this occasion, that under such circumstances the jobber was discharged. In *Maxted v. Paine* (1st action) ⁽²⁾, before the Court of Exchequer, in which a person's name had been given without authority, the Court of Exchequer came to the conclusion that the jobber remained liable notwithstanding the transfer to the person whose name had been so given without his authority. In the present case the infant certainly did not give any authority for the insertion of his name, for the best of all possible reasons, that he was legally incompetent to give any such authority. Therefore we have to decide whether there is any distinction between the two cases — the case in the Court of Exchequer, in which it has been decided that a transfer to a person who had not authorized the transfer to be made to him was nothing, and the case before us, which is the case of an infant who has in the like manner not authorized it, because he could not do so.

Now, how would the case stand on principle independently of authority? It appears to me that up to and at the moment when the jobber gave in the name to the broker the jobber was bound in law to complete the bargain which he had made. He was at that time under an obligation to take the shares from the plaintiff, and to take them in such a way as to give the plaintiff an entire release and indemnity against all future liability in respect of them. That was the nature of the transaction, that [749] was *his position up to the moment when he gave in the name. What was the effect of giving in the name, and the execution of the transfer on the name being so given in? It cannot be said to be a fulfilment of the contract with the jobber. The contract remained unfulfilled. The shares still remained, in point of law, vested in the plaintiff, because the transfer was a piece of waste paper. Therefore there was no fulfilment of the contract in that way.

Then was there anything which amounted to a release of the contract? Can it be said that the plaintiff and defendant met together and virtually discharged each other, one from the obligation to pay, and the other from the obligation to transfer? There is no pretence that there was any such thing. Was there anything in the nature of accord and satisfaction, or anything in the nature of *novatio contractus*? In my opinion it is impossible to say that a piece of waste paper or a void contract, pro-

⁽¹⁾ Law Rep., 13 Eq., 203.

⁽²⁾ Law Rep., 4 Ex., 81.

fessing to be made by a person incapable of entering into a contract, can amount to a satisfaction in law. It is equally impossible, in my view, to hold that there can be a *novatio contractus* when there is no new person capable of entering into the contract. That is how the case stands upon principle.

How is it upon authority? The principle of those authorities of *Grissell v. Bristowe* ⁽¹⁾ and *Coles v. Bristowe* ⁽²⁾ was explained in a judgment which, to my mind, is binding upon us. It is a judgment of this Court given by the Lord Chancellor *Hatherley* in *Cruse v. Paine* ⁽³⁾, in which, while he distinguished the case on the ground that there was there a guaranty of registration, he laid down what the principle of the previous cases was. Lord *Hatherley* there says: "*Coles v. Bristowe* and *Paine v. Hutchinson* ⁽⁴⁾ had established that, in the case of an ordinary sale to a jobber, the real contract was that at the settling day he would either take the shares himself or give the names of one or more transferees, who would pay for the shares, and to whom no reasonable objection could be taken. In this case, however, there was superadded an express provision that the sale was made not ordinarily and simply, but with registration guaranteed. These words introduced a material distinction, the exact *meaning of which the Court was now called upon to ar- [750
rive at. Sir *Roundell Palmer* had contended that the only meaning was that the vendor could call upon the jobber to proceed against the purchaser and compel him to register; but that was not a sound construction of the contract, which was one inseparable bargain for a price fixed with reference to this guaranty; and the terms were not merely that the jobber should find a purchaser who would pay for the shares and accept the transfer, but that the jobber should find a purchaser who would do that, and would also register the transfer, and until that had been done the jobber was not discharged from his engagement." That is to say, that in the simple case, from which that case was an exception, the bargain was that the jobber should find a purchaser who would pay for the shares and accept the transfer. In this case I am of opinion that the jobber has not found a purchaser who has paid for the shares and accepted a transfer, because the infant was utterly incapable of accepting the transfer. It seems to me, therefore, that according to the principle of the cases, as judicially expounded by the decision of the Lord Chancellor, it was essential to the discharge of the jobber that there should be a real purchaser, a man named who would pay for the shares and accept the transfer. In my opinion that is sufficient to dispose of the case.

⁽¹⁾ Law Rep., 4 C. P., 36.

⁽²⁾ Ibid, 4 Ch., 8.

⁽³⁾ Law Rep., 4 Ch., 441, 443.

⁽⁴⁾ Ibid, 3 Ch., 383.

It is true that in the second action of *Maxted v. Paine* ⁽¹⁾, before the Court of Exchequer Chamber, there is a very elaborate judgment of Mr. Justice *Blackburn* which, when one reads it at length and considers the whole tenor of it, would appear to be rather an exposition of the law intended for the guidance of the House of Lords if and when the whole matter should ever come to be reviewed before that tribunal of ultimate appeal; because the thesis of the learned Judge is, not that the cases were wrongly decided, but that the cases were decided on a wrong principle. However, that is not the way a Court like this deals with the decisions of a Court of co-ordinate jurisdiction. The cases which are cited do not bind us as *res gestæ*, because they are *inter alios acta*; but they bind us in so far as they are authoritative expositions and statements of the law. It is the principle of the decision by which we are bound, not a mere rule that in exactly the same circumstances we are to arrive at 751] the same conclusions. *Therefore to say that the decisions are wrong in point of principle, if that principle was clearly laid down, does not relieve us from the obligation of following the principle of the decision, because the whole theory of our system is, that the decision of a superior Court is binding on an inferior Court and on a Court of co-ordinate jurisdiction, in so far as it is a statement of the law which the Court is bound to accept. The law as laid down by the Lord Chancellor is, that the jobber was entitled to be discharged if and if only he found a purchaser who would pay for the shares and accept a transfer.

Having read the judgment of that learned Judge (Mr. Justice *Blackburn*) with great care, I am obliged to add that he has not satisfied me of the thesis which he purports to establish, that the cases were rightly decided on a wrong principle of law. I am bound to confess that he has very nearly satisfied me that the cases were wrong, if it were open to me to discuss them. He has nearly satisfied me that the jobber's contract was not completed until there was an actual registration, that is to say, that every contract did, in its very essence, imply that which was in terms expressed in *Cruse v. Paine* ⁽²⁾, that not only there should be a transfer, but that the transfer should be registered, so that the vendor should find himself in the position he contracted to be in, viz., actually released from and indemnified against all subsequent liabilities. However I am of opinion, if that was the law, it would be still more fatal to the contention of the defendant in this case.

I am of opinion that the jobber has not discharged himself from his liability, either to take the shares himself or to take them by a person competent and willing to do so. That being so, I

(1) Law Rep., 6 Ex., 132.

(2) Law Rep., 4 Ch., 441.

think that the judgment ought to be reversed, and that the plaintiff is entitled to the relief which he asks by his bill.

SIR G. MELLISH, L.J. :

I am of the same opinion. In the first place, I think the case now before us cannot be distinguished from *Maxted v. Paine* (1st action) (1). In that case the Court of Exchequer held that if the person whose name was on the ticket, and to whom the transfer was made, had given no authority to the broker who issued the *ticket to insert his name, then, inasmuch as there [752 was no purchaser to accept the transfer of the shares, the jobber was not discharged. In the present case the person whose name was put upon the ticket was a youth of sixteen, and the only evidence that is given as to his having, in point of fact, given any authority to put his name on the ticket was, that he remembered about that time, in 1865, the manager of the company used to ask him occasionally to execute transfers, some fully filled up and some in blank, but that he had no recollection of having executed any transfer in this particular case; and the transfer itself has not been found.

Under these circumstances it would be very difficult indeed, and, as it seems to me, absurd to say that the broker could have any authority to put the name of this boy on the ticket. I may observe that it is not exactly like the case where an infant purchases shares for himself, or even where a father, wishing to make a present to his son, who is an infant, buys shares and registers them in his name. In such a case there is a possibility that the infant might adopt the contract when he comes of age, and that it might be a contract for his benefit. But when an infant has no interest in the shares whatever, and is not intended to have an interest, but his name is simply used to free others from liability, it is utterly impossible that such a transaction can be for the benefit of the infant. In this case, therefore, it is quite clear that the infant never gave any authority to put his name in the ticket at all. That being so, the case comes within that decision of the Court of Exchequer, and the question we have to consider is whether we ought to follow that case, or treat it as overruled. Mr. Justice *Blackburn*, in his very elaborate judgment in the second action of *Maxted v. Paine* (2), stated principles which certainly cannot be reconciled with the decision in the first action of *Maxted v. Paine* (1); indeed, he as much as said that he did not agree with it. The decision of Lord *Romilly*, also, in *Rennie v. Morris* (3), which was the case of a transfer to an infant, cannot be reconciled with the principle upon which the Court of Exchequer acted. Therefore we

(1) Law Rep., 4 Ex., 81.

(2) Law Rep., 6 Ex., 132.

(3) Law Rep., 13 Eq., 203.

have to consider what decision we will follow. Now, we are in some respects in a different position from the Judges in Courts [753] of Law; *because in those cases, the custom had all been found by arbitration, and stated in the special case, and the Judges were bound by it. But here we are acting as Judge and jury, and have to say what the custom was, and whether the custom alleged, if it really existed on the *Stock Exchange*, was binding in point of law. This particular sale of which we have to consider the legal effect, was made as far back as July, 1865; it was made before the failure of *Overend, Gurney, & Co.*, before *Coles v. Bristowe* ⁽¹⁾ or *Grissell v. Bristowe* ⁽²⁾ had been decided, and before the question had arisen to any serious extent, if at all, as to what the liability of jobbers was. Nevertheless, no doubt the practice and usage of the *Stock Exchange* was substantially the same then as it is now. But I think, as Lord Cairns said in *Coles v. Bristowe*, we ought to put a reasonable construction on the usages of the *Stock Exchange*. We must look not so much to what the jobbers, now five years afterwards, and when they are fully alive to the liabilities they may incur, may say they think is the legal effect of the usage of the *Stock Exchange*, but we must look at what the usage is, for what purpose it was instituted, and what is the proper legal effect of it.

Now, looking at the evidence in this case — we have the evidence of Mr. *Cupper*, a broker, who has made an affidavit for the plaintiff as follows: He states that the usage of the *London Stock Exchange* in July and September, 1865, was this, that a stock jobber who entered into an agreement for the purchase of shares in a company was bound either to nominate, by the day fixed for the completion of the purchase, a transferee of such shares capable of effectually accepting the transfer thereof, or to accept a transfer thereof into his own name. Therefore, according to that statement of the usage, unless the person whose name was on the ticket was a person who was both ready and able to accept the transfer of the shares, the jobber was not discharged.

Now, the evidence on the other side is of the defendant himself and two other gentlemen, who state that they are members of the *Stock Exchange*, but do not in terms state whether they are jobbers or brokers, but I presume they are jobbers. They state the usage in substantially the same manner as it has been stated [754] *in all the numerous cases that have occurred; but they draw the inference that the jobber is absolutely discharged if the name of the man in the ticket is accepted, and a transfer made to him, although that transfer may be an utter nullity from the person having no authority. They draw that inference from the usage.

(1) Law Rep., 4 Ch., 3.

(2) Law Rep., 4 C. P., 36.

Then I observe that Mr. *Tutham* is brought to make an affidavit for the purpose of accounting for one particular transaction which took place, which seems to have little or nothing to do with the present case. He being a broker is not asked to give any evidence of what the custom was. Therefore it looks as if there was a difference of opinion on the *Stock Exchange* as to what had been the usage at that time between the brokers and the jobbers.

Now, independently of the question whether the members of the *Stock Exchange* could legally make such a rule, I am not convinced as a matter of fact that it was a well established rule of the *Stock Exchange* in the year 1865, that if the person named in the ticket turned out to have given no authority, then the jobber was discharged. As I understand the view which Mr. Justice *Blackburn* takes, and which has been now argued before us, it is this — that what is called the novation or substituted contract that is made when the jobber is discharged is not made with the person whose name is put on the ticket, but is made with the broker who issues the ticket; and this view is based upon the fact that the brokers and jobbers on the *Stock Exchange* deal only with each other, and enforce contracts only against each other. That, no doubt, is perfectly true, because the brokers have no jurisdiction over the principals, neither do they give any benefit to them. The principals cannot go on the *Stock Exchange* and get any redress from the *Stock Exchange* against a broker or a jobber; but beyond all question, the rule of law has always been that the undisclosed principal of the broker (because they must know that a broker has an undisclosed principal) may come in and sue upon the contract.

Now the real question is, giving a fair construction to the usage of the *Stock Exchange*, what is the contract which the undisclosed principal of the broker makes with the jobber? Is it a contract that he will take and accept the broker who issues the ticket as a person who is to be liable to him in lieu and instead of the *jobber? Or is it a contract that he will take [755 the person whose name is put on the ticket as a transferee and purchaser from him in lieu of the jobber, so that the jobber is not discharged from his contract with the purchaser unless a transfer is made to a person who has given authority to have that contract accepted? Beyond all questions, in all the earlier cases, the opinion the Judges came to upon the real meaning of the rules of the *Stock Exchange* — and what I cannot help thinking is their real meaning — was that the real object of the rules was to bring the seller and the purchaser together, that is, not the broker and the jobber, but the real seller, the man who wants to dispose of the shares, and the real purchaser, the man

who wants to get the shares transferred to him — to bring them together and enable them to contract with each other. The reason why it was necessary to have a ticket, and why these tickets pass through a great number of hands, is, as is well known, that besides purchasers and sellers on the *Stock Exchange* there are a great number of people who are not sellers or purchasers, but who are “bulls” and “bears,” who are betting on the rise or fall of the shares between the time of making their contract and the account day; who never intend to transfer shares or to accept the transfer of shares, but only intend to receive and pay the difference. This is a most convenient usage to them, because as the ticket passes from hand to hand the differences are marked and paid, and these people who never mean either to deliver shares or to accept shares, get their differences, and their contracts are all over. But then the object of the custom is, that if there happen to be a real seller and a real purchaser they may be brought together.

Now what is the ticket? The ticket is issued by the purchaser's broker, and it appears to me, the broker who issues that ticket professes to be the agent of the man whose name is on the ticket. I cannot agree with Mr. Justice *Blackburn* that he offers to make a contract on his own account. It appears to me that what he does is this: he represents that the person whose name is on the ticket is his principal; that he has authority to bind him; that he is a person capable of accepting the shares; and that he, the broker, has authority to accept the transfer on his account so as to bind him. It appears to me that he makes 756] that representation, *and if that representation is true, if the person whose name is on the ticket has really authorized the broker to put his name on it, then it appears to me the person whose name is on the ticket offers to make this contract: He says, in effect, to any person to whom this ticket may come in the course of the ordinary business of the *Stock Exchange*, if he is a person who has got the shares to transfer: “You may make out the transfer of the shares and insert my name as the purchaser, and when the transfer is brought to my broker, whose name is on the ticket, he will on my account pay the purchase money which I have agreed to pay, not to the person from whom I have purchased, but to the broker who brings the transfer, and I will engage to accept that transfer.” It appears to me that when the broker of the original vendor, having received the ticket fills in the transfer and gets his principal to execute the transfer to the person whose name is on the ticket, and then takes it to the broker whose name is on the ticket, and he accepts it and pays the purchase money, then a perfect privity of contract is established between the vendor and the ultimate pur-

chaser. Then the contract of the jobber, that instead of himself he will find another purchaser, is fulfilled. But the broker who issues the ticket is not liable on the contract as a purchaser at all. I do not at all mean to say that he is not liable; on the contrary, if the representation he makes is untrue, if the person whose name is on the ticket has really never authorized him to put his name there, or is a person who is incapable of taking shares, being an infant, then it appears to me the broker who issues the ticket makes an untrue representation, and whether he makes it fraudulently or not I apprehend that, according to the rules of this Court, if anybody to whom that ticket passes in the ordinary course of business alters his position, and incurs pecuniary loss from believing and trusting in the truth of that statement, the broker would be liable to make good his representation. It may be, if the broker had an ultimate principal who put somebody else's name on the ticket, that in this Court that ultimate principal would be liable; and indeed it has been so held. But I cannot see that there is any privity of contract by the original vendor with the broker who issued the ticket, or indeed with the principal of that broker, unless his name is put on the ticket, because it appears to me that *the only [757 contracts are the original contract between the vendor and the jobber, and then, by the usage of the *Stock Exchange*, the further contract that in lieu and instead of the jobber the vendor will accept the name of the person who is on the ticket. But it appears to me that all that is on the assumption that there is a real purchaser or a real transferee. I make a distinction between the terms, because in *Maxted v. Paine* (2d action) (1) the judges came to the conclusion (and I do not dispute the correctness of that decision) that the person whose name is on the ticket need not be a person who has really purchased the shares; but the person who has purchased the shares is entitled to put the shares in the name of somebody else, and that in that case there would be a compliance with the rules of the *Stock Exchange*. That I would not at all dispute. But certainly it has never been held yet (unless it was so held in the case before the Master of the Rolls) that the jobber was discharged unless he produced somebody else to take his place.

Now there is some evidence in this case which I think is not immaterial to refer to, which is given by the defendant and some of his witnesses respecting the present usage in the *Stock Exchange*, and illustrates what appears to be said by Mr. Justice *Blackburn*, that as all the contracts are really with the members of the *Stock Exchange*, if they are discharged their principles must be discharged, because the real contracts are made with

(1) Law Rep. 6 Ex., 132.

them. They give this evidence because one witness on behalf of the plaintiff gives evidence that on one occasion, after the whole of the transaction had been completed, the committee of the *Stock Exchange* made the ultimate broker personally responsible. Now the evidence of the defendant is to this effect: "The decision of the committee directing the said broker to indemnify the said *George Copeland Copper* was in accordance with the rules and usages of the *Stock Exchange*, it having been the practice of the committee in cases where shares had been transferred into the name of a minor or that of some other person to whom reasonable objection had been established, to hold that the member who issued the ticket with such name should be liable to indemnify the transferor from the consequences thereof; 758] of; but since the recent decisions of this honorable *Court holding the real buyer liable to indemnify the transferor they have ceased to hold the broker responsible in such cases, and have left the transferor to his legal remedies against the transferee or the real buyer." Now, observe what the committee have done since they found that this Court will hold either the transferee or the person who put the broker in motion responsible; they have made it a rule of the *Stock Exchange* that the broker of the ultimate purchaser shall not be liable, although he has put on the ticket the name of an infant or the name of a person incapable of taking shares. According to the doctrine of Mr. Justice *Blackburn*, the broker being discharged, the employer of the broker will be discharged also.

Can they really make such rules as that? According to their rules nobody is liable. The broker of the original vendor cannot be made liable for his carelessness in not finding out that the name on the ticket was that of an infant, and the jobber cannot be made liable for the breach of his contract, and the broker who issues the ticket cannot be made liable unless he has been guilty of actual fraud, and then they say that outside persons are to sue each other.

We must look to the rules as they existed before these questions arose, and it appears to me that the fair and reasonable construction of them is, that the jobber made the contract for the purchaser, but that he made it with the condition that inasmuch as he did not want to take the shares himself, if by means of the rule of the *Stock Exchange* he produced another person who did accept the transfer, then he was discharged. If it turn out unfortunately that the person whose name is put on the ticket, and to whom the transfer is made, is a person who has given no authority to take the transfer, and who is not a purchaser, then it appears to me the jobber has not performed his contract, and therefore is not discharged.

Now there is one passage which I wish to read, in addition to what has been read by the Lord Justice, simply to show that the other judges did not concur with Mr. Justice *Blackburn*, and that in the decision of *Marted v. Paine* (2d action) ⁽¹⁾ they have not altered the principle upon which they have hitherto proceeded. *After Mr. Justice *Blackburn* had delivered his [759 judgment in that case, Lord Chief Justice *Cockburn* gave his judgment, and he put it entirely on the ground that the case could not be distinguished from *Grissell v. Bristowe* ⁽²⁾. He says ⁽³⁾: "If this be so, the case is brought directly within the decision in *Grissell v. Bristowe*. In that case the Court held that while, according to the reasonable construction of the usage of the *Stock Exchange*, the first buyer, in availing himself of the right afforded by the usage, and therefore implied by and comprehended within the terms of the original contract, of substituting another buyer for himself, was bound to give the name of a person willing and able to fulfil the contract; yet if the seller, instead of objecting to the person so proposed, accepted such person as the buyer, and proceeded to transfer the shares to him, he took him for better or worse, and in so doing released the original buyer from all further liability."

In my opinion that is a true description of the contract. If the person whose name is on the ticket is willing and able to fulfil the contract, then, as soon as the transfer is made to him, the jobber is discharged. But in the present case, there being no person willing and able to fulfil the contract, and the person whose name was on the ticket having given no authority to the jobber to put his name there, the jobber is not discharged.

SIR W. M. JAMES, L.J. :

I desire to add that our decision in this case will, in my judgment, do no injustice. The vendor, who is not a member of the *Stock Exchange*, has his remedy against his purchaser, the jobber; and the jobber, having been misled by somebody else on the *Stock Exchange*, and so left liable, will have such relief from that domestic tribunal as, according to the rules of that body, he is entitled to have against the member who has really caused the mischief; and possibly they may think it right to alter their rules accordingly.

Solicitor for the plaintiff: Mr. W. A. Crump.

Solicitors for the defendants: Messrs. Morley & Shirreff.

⁽¹⁾ Law Rep. 6 Ex., 132.

⁽²⁾ Law Rep. 4 C. P., 36.

⁽³⁾ Law Rep. 6 Ex., 183.

Where an infant sent money to his brother to be used in support of their parents, if necessary, and the same was so used by the brother before revocation

of the authority, held the infant, on arriving at age, could not recover it. *Welch v. Welch*, 103 Mass., 562.

L.JJ. July 29 1872.

JONES V. FROST.

1867 J. 136.

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*In re FIDDEY (A SOLICITOR).

[Law Reports 7 Chancery Appeals 778.]

Solicitor's Lien — Charge on Property recovered — 23 & 24 Vict. c. 127, s. 28 — Useless Suit — Suit no longer pending — Recital in deed by Married Woman — Estoppel.

A solicitor is entitled to a charge for his costs on property the subject of a successful suit conducted by him against an incumbrancer, although the incumbrance be entirely valueless, provided it formed a cloud upon the title.

It is no objection to an application for such a charge that it is made in a suit which is no longer pending, and which was never brought to a hearing, nor that the property has been sold before the application of the solicitor.

Semble, a married woman is bound by estoppel by a recital in a deed duly executed and acknowledged by her, in the same manner as if she were a *feme sole* . Order of the Master of the Rolls affirmed.

THIS was an appeal from an order of the Master of the Rolls.

William Blackman, by his will, dated the 18th of December, 1822, devised a freehold messuage and premises in the city of London to trustees upon trust to pay the income to his wife, *Martha Blackman* (afterwards *Martha Wright*), during her life, and after her death upon trust to pay the income to his daughter, *Ellen Watts Blackman*, during her life for her separate use, and after her death in trust for all the children of his said daughter as tenants in common in fee; and in default of children he declared *that the hereditament should be held in trust for his son, *William Blackman the younger*, in fee. The testator died in November, 1828.

Ellen Watts Blackman married *G. Bradbury*, but had no children.

W. Blackman the younger had one child only, namely, *Jane Nottingham Jones*, the wife of *Thomas Jones*.

On the 27th of November, 1864, while *Martha Wright*, *Ellen Watts Bradbury*, and *W. Blackman* the younger, were still alive Mr. and Mrs. *Jones* executed a deed, which recited erroneously that *W. Blackman* the younger was dead, and thereby, in consideration of £25, they conveyed to the defendant *W. Frost* "all the estate and interest of the said *Jane Nottingham Jones* and of the said *T. Jones* in her right in all the property to which, under the trusts of the will of *W. Blackman* the elder, the said *Jane Nottingham Jones*, as the only child of the said *W. Blackman* the younger deceased, was or would become entitled in possession or in remainder expectant or contingent upon the death of the said *Martha Wright*, and upon the death of the said *Ellen Watts Bradbury* without issue."

This indenture was duly acknowledged by Mrs. *Jones*.

W. Blackman the younger died on the 12th of March, 1867, intestate.

On the 31st of December, 1867, Mr. and Mrs. *Jones* filed this bill in the Rolls Court against *Frost* for the purpose of setting aside the sale of Mrs. *Jones*' expectant interest. Mr. *H. W. Bull* was the solicitor employed by the plaintiffs in filing the bill. On the 12th of June, 1868, Mr. *Fiddey* was substituted for Mr. *Bull* as solicitor for the plaintiffs; but on the 15th of August, 1868, Mr. *Bull* was restored as solicitor in Mr. *Fiddey*'s place. On the 20th of December, 1868, *Frost* put in his answer, in which he submitted to reconvey to the plaintiffs their interest in the property on being repaid the sum of £25.

On the 26th of February, 1869, Mr. *Bull* was again removed and Mr. *Fiddey* was reinstated as solicitor for the plaintiffs. On the 16th of August, 1869, Mr. and Mrs. *Jones* conveyed their reversionary interest for its full value to *S. C. Martin*, who again sold it to *J. L. Heinrich*.

On the 27th of October, 1869, Messrs. *Wilkinson & How'ell*, **Heinrich*'s solicitors, were substituted for Mr. *Fiddey* as [775 solicitors for the plaintiffs in the suit.

In June, 1870, the bill in *Jones v. Frost* was dismissed by consent of all parties, and the property reconveyed by *Frost*.

In November, 1870, the suit of *Heinrich v. Sutton* was commenced by *Heinrich* against some other persons claiming interest in the property.

Mr. *Fiddey* had his bill of costs in *Jones v. Frost* taxed at £120, and took out a summons in the Chamber of the Master of the Rolls, asking for a charge for his costs upon the property recovered in that suit, under the 28th section of the *Solicitors Act*, 1860 (23 & 24 Vict. c. 127). The Chief Clerk refused the application on the ground, as was stated, that the summons was not intituled "*In re Fiddey (a Solicitor)*," and that the suit of *Jones v. Frost* no longer existed; and the summons was never adjourned into Court.

Mr. *Fiddey* then took out a similar summons before Vice-Chancellor *Malins* in the suit of *Heinrich v. Sutton*, who made the order asked for; but his decision was reversed by the Lords Justices on the ground that the application ought to have been made in the branch of the Court to which the suit of *Jones v. Frost* had been attached (¹).

Mr. *Fiddey* then presented this petition to the Master of the Rolls, which was served upon Mr. and Mrs. *Jones* and upon *Heinrich*, stating the circumstances, and praying for a declaration that the petitioner was entitled to a charge upon the reversionary estate of the plaintiffs, Mr. and Mrs. *Jones*, for the amount

(¹) See *Heinrich v. Sutton*, Law Rep. 6 Ch., 865.

of his taxed costs with interest. The Master of the Rolls made the order prayed for, and from this decision *Heinrich* appealed.

Mr. *De Gex*, Q.C., and Mr. *Ramadge*, for the Appellant:

The order is erroneous for several reasons. In the first place, the 28th section of the *Solicitors Act*, 1860 (23 & 24 Vict. c. 127), under which this application is made, gives power to make the order "to the Court or Judge before whom any such suit, matter, or proceeding has been heard or shall be depending." The suit of *Jones v. Frost* never was heard and is not now depending, for it has been dismissed; therefore the Court has no jurisdiction.

776] *In the second place, nothing at all was recovered or preserved by means of that suit. For at the time when the deed was executed Mrs. *Jones* had no interest but a mere possibility, which she could not convey. If she had been a *feme sole* she might have been bound by way of estoppel by the statement in the deed that her father was dead, but there is no authority for holding a married woman bound by estoppel in such a case. She did not even profess to convey the estate, but only her "interest" in it, which was nothing. The suit and subsequent reconveyance were therefore entirely useless.

[The LORD JUSTICE JAMES referred to *Crofts v. Middleton* (1).]

Again Mr. *Fidley* was not the solicitor at the time when the bill was filed, nor when the suit was dismissed. He cannot be said to have recovered or preserved anything.

Mr. *Southgate*, Q.C., and Mr. *Cecil Dale*, for the petitioner, were not called on.

Mr. *Pace*, for Mr. and Mrs. *Jones*.

SIR W. M. JAMES, L.J.:

In this case several points have been raised and argued which have no real bearing on the question at issue. A solicitor asks for a declaration that he has a charge on some property recovered in a suit in which he was employed, and the respondent says that he recovered nothing whatever, because the suit was practically useless. The solicitor was employed by Mr. and Mrs. *Jones* for the purpose of getting rid of a deed which Mrs. *Jones* had executed, and by which she was bound as fully and effectually as if she had been a *feme sole*. By the deed she purported to convey all her interest in the property, and it contained a statement that her father was dead. It is not necessary now to decide what is the effect of a married woman making a statement of that nature in a deed, but I apprehend that when the point comes to be decided it will be held that it has exactly the same effect as if she were a *feme sole*. However, the suit was

(1) 8 D. M. & G., 192.

carried on, and, as it seems to me, for the benefit of *Heinrich*, who was the purchaser; and then *by a compromise, the [777 bill was dismissed and a reconveyance made which was really for the benefit of the purchaser. Under these circumstances, I am of opinion that the property was properly recovered by the instrumentality of the solicitor. It was freed from that charge, incumbrance, or cloud which affected it, by the suit; and therefore the solicitor is entitled to the charge he asks for. I can see no difference between the position of the plaintiffs and the purchaser. He knew that there was a pending suit, and that costs must have been incurred in it, and he ought to have inquired whether the solicitor had been paid; at all events, the purchaser ought not to stand in the way of the solicitor's right to a charge.

I am therefore of opinion that the order was right; and the appeal must be dismissed with costs.

SIR G. MELLISH, L.J., concurred.

Solicitors: Messrs. *Wilkinson, & Howlett*; Mr. *Fidley*.

See note 2 Eng. Rep., 628.

It has recently been held by the New York Common Pleas, at Special Term, that a settlement of a suit by the parties was good unless made collusively and in fraud of the attorney's rights: that before entry of judgment, the attorney has no lien and the parties can settle without consent of their attorneys. *Wade v. Orton*, 12 Abb., N.S., 444.

In *Welsh v. Hole*, 1 Douglas, 238, it was held that the attorney in order to protect himself, in an action of tort, should give the adverse party notice of his right and not to settle with his client.

It is somewhat uncertain when and how far an attorney may refuse to produce papers in his possession on which he has a lien. In *Gregory v. Crennell*, (1 Holt's Eq., 17), upon motion that solicitors who had withdrawn them-

selves from the suit during its continuance, should produce the deeds, &c., and deposit them in the Master's office it was objected by the solicitors, that there were certain costs due their predecessors, prior to the commencement of the suit, which had already been taxed; that the deeds, &c., had come into their possession prior to the suit, and that they had consequently a lien upon them; the Court, nevertheless, ordered their production." The cases are reviewed in a note to this case: see also *Commerell v. Paynton*, 1 Swanst., 1; *Brassington v. Brassington*, 1 Sim. and Stu., 455; *Lord v. Wormleighton*, 1 Jacobs, 580; *Moir v. Mudie*, 1 Sim. and Stu., 282; *Colegrove v. Manley*, 1 Turn. and Russ., 400; *Mountford v. Scott*, 1 Turn. and Russ., 274; *Healop v. Metcalf*, 3 Myl. and Cr., 183; *Cane v. Martin*, 2 Beav., 584.

L.JJ., July 2, 8, 11, 29, 1872.

BEATTIE v. LORD EBURY.

1868 B., 257.

[Law Reports, 7 Chancery Appeals, 777.]

Misrepresentation of Fact or Law—Liability to make good Representation—Directors—Personal Liability.

Three directors of a railway company opened, on behalf of the company, an account with a bank, and sent a letter signed by the three as directors requesting the bank to honor checks signed by two of the directors and countersigned by the secretary. The account having been largely overdrawn by means of such checks, the bank sued the company at law, recovered judgment in 1865, and issued an

eligit. The proceeds being insufficient to satisfy the debt, the bank filed a bill to make the directors personally liable:

Held (reversing the decision of *Bacon*, V.C.), that the letter did not make the directors personally responsible for the debt, for that, assuming the letter to contain a representation that the directors had power to overdraw the account, and such representation to be erroneous, this was not a misrepresentation of fact which the persons making it were bound to make good, but only a mistaken representation of the law; and, moreover, that even if it had been such a false representation as the directors were bound to make good, the bank would have had [778] no claim against them, since it had been able to *enforce the same remedies against the company as if the representation had been true.

Seemle, that the letter did not involve any representation that the directors had any other power than the ordinary powers of directors.

In 1864 a negotiation took place between the company and the bank as to the company giving security for the overdrawn account, and in December, 1864, the bank manager wrote to the secretary of the company, "I am directed to apply to you for a transfer of at least £20,000 of the unissued preference shares into the joint names of myself and *J. A. B.*, to be held for the bank as collateral security, and I am to request that your unissued debentures are to be transferred into the same names, you undertaking to do this when you are in a position to issue them." The secretary replied that the directors assented, and had directed him to allot the shares to the bank manager and *J. A. B.* as collateral security. In the following month, the company having sanctioned the issue of the preference shares, the secretary wrote, "I am now prepared to place the shares and debentures named in your letter in your possession as collateral security to the bank. I propose, as the course usually adopted in such cases, to register the shares in the names of two of the directors of the company, who will execute a transfer of them to you and *J. A. B.* on a mutual understanding that they are to be held by you only as collateral security for the debt due to the bank." The manager replied, "I am quite prepared to accept the shares and debentures as collateral security pending your disposal of them." Preference shares were accordingly issued to two of the directors, and transferred by them to the bank manager and *J. A. B.*, and debentures given to the same two directors, which were similarly transferred. Nothing had been paid on the shares, and the company were not yet in a position legally to issue the debentures.

Held (reversing the decision of *Bacon*, V.C.), that the above circumstances did not make the directors personally liable, and that, on the construction of the correspondence, the directors had not made any representation that the shares and debentures were valid and fully paid up shares and debentures, but the nature of the agreement was only that the shares and debentures should be placed under the control of the bank, so that when they were taken up by the public the money paid for them must come to the hands of the bank.

Collen v. Wright ⁽¹⁾, *Richardson v. Williamson* ⁽²⁾, and *Cherry v. Colonial Bank of Australasia* ⁽³⁾ distinguished; *Rashdall v. Ford* ⁽⁴⁾ approved.

THIS was an appeal by the directors of the *Watford and Rickmansworth Railway Company* from a decree of Vice-Chancellor *Bacon*, who had held them personally liable for a debt due from the company to the *Union Bank of London*.

The bill was filed by *John Beattie* and *John Arthur Barton*, the managers, and *John Chapman*, a public registered officer of the [779] *bank, against Lord *Ebury*, the Hon. *R. A. Capel*, the Hon. *R. W. Grosvenor*, *Joseph Cury*, and *J. H. Dillon*, five of the directors of the *Watford and Rickmansworth Railway Company*, *Alexander Forbes*, the secretary, and the railway company itself.

⁽¹⁾ 8 E. & B. 647.

⁽²⁾ Law Rep., 6 Q. B., 276.

⁽³⁾ Law Rep., 3 P. C., 24.

⁽⁴⁾ Ibid., 2 Eq., 750.

By the *Watford and Rickmansworth Railway Act*, 1860, passed on the 3d of July, 1860, (23 & 24 Vict. c. cxi.), it was enacted that the four first-named defendants, with four other persons, should be incorporated by the name of the *Watford and Rickmansworth Railway Company*; and the same eight persons were named the first directors. The share capital of the company was to be £40,000 in 4000 shares of £10 each.

Sect. 9 provided that the company might borrow on mortgage any sum not exceeding £13,000, but no part of such sum was to be borrowed until the whole of the capital should have been subscribed for and one half paid up.

The *Union Bank* were appointed the company's bankers; and, in pursuance of a resolution passed at a board meeting of the company's directors, held on the 4th of July, 1860, the following letter was on the same day written and sent:

"To the directors of the *Union Bank of London*, or their manager, at the *Temple Bar Branch, Chancery Lane*.

"Gentlemen,

"*Watford and Rickmansworth Railway*.

"Please to honor the cheques of this company signed by two of the directors, and countersigned by the secretary.

" <i>Joseph Cary</i> ,	} Three of the directors of the above company.
" <i>Reg. Capel</i> ,	
" <i>J. Warwick</i> ."	

"Dated this 4th July, 1860."

Early in 1861 an advance of £6000 from the bank being requested, the bank took from the defendants, Lord *Ebury*, *Capel*, and *Cary*, and a fourth (then) director, *Warwick*, a letter whereby the writers "undertook," in consideration of the advance of that sum by the bank, "that the said sum of £6000 and interest shall be repaid you within six months from the date of the advance, from the calls due on the shares of the company."

On the 8th of August, 1861, the Defendant *Dillon* became a *director. The account of the company having become [780 considerably overdrawn, *Beattie*, as manager of the bank, wrote on the 10th of December, 1862, to the solicitor of the company to say that he had been instructed by the directors of the bank to call the attention of the company's directors to the large amount owing to the bank, and to request an early liquidation; and he asked the solicitor to obtain the signature of the chairman and directors to a form of guaranty, which he enclosed, making them personally liable for repayment by the company of what was due. To this form of undertaking the railway directors objected; whereupon, on the 11th of December, Mr. *Beattie*, again wrote, saying that he must have the personal guaranty of the directors; and again, on the 12th of December,

he wrote, "My application to you on the 10th instant was not for an indemnity by the company, for that would not alter my present position . . . but I require . . . the personal undertaking of every director to hold the bank harmless."

After this *Beattie* had an interview with the five first-named defendants, and on the 19th of December, 1862, he wrote to Lord *Ebury* as follows:

"*Watford and Rickmansworth Railway.*

"My Lord,—I have to thank your Lordship and the directors for so kindly granting me an interview; and, in compliance with your request, now beg to state that I shall be obliged by your giving directions for my being allowed to inspect all the books of the company bearing on cash matters; also that I may be furnished with a copy of the share register, showing the number of shares issued, with the amount of calls in arrear. I have further to request that the unissued shares be given to the bank as collateral security, and that your board will undertake to hand to the bank such preference shares and debentures as you may obtain authority to raise in next session of Parliament."

Of the same date there appeared the following entry in the directors' minute book:

"Mr. *Beattie* attended on behalf of the *Union Bank* to make arrangements with regard to the debt due to the bank, and a letter was subsequently received from him to which Mr. *Jeyes*" (the then secretary) "was instructed to reply, consenting to his application."

781] *Accordingly, on the same day, the secretary replied, stating that instructions had been given to allow the inspection, and to furnish a copy of the share register showing the number of shares registered, with the amount of calls in arrear; and the writer continued: "My directors desire me to assure you that all unissued and all preference shares and debentures to be created by a bill about being introduced into Parliament shall be handed to your bank in a sufficient amount to cover the balance now due upon the account of the company."

On the 13th of July, 1863, was passed the "*Watford and Rickmansworth Railway (Sale) Act, 1863*" (26 & 27 Vict. c. cxxxi.), intituled "*An Act to grant further powers to the Watford and Rickmansworth Railway Company.*" The Act, by its preamble, recited the former Act, and that the company had constructed the railway, and that the same had been opened for traffic; and continued:

"And whereas the company have issued the whole of their shares, and none thereof have been forfeited, and the company have borrowed and now owe £13,000; and whereas the amount

which the company are authorized to raise, by shares and by borrowing, is insufficient for the purposes of their undertaking, and it is expedient that they be authorized to raise additional funds."

It was then enacted (sect. 6) that the company might, from time to time, raise (in addition to the sums which they were already authorized to raise) any further sums not exceeding £30,000 by the creation of new shares; and might, from time to time, fix the amounts and times of payment of calls, and dispose of such shares "on such terms and conditions, not being less than the nominal amount," as might be resolved upon; also (sect. 7) that the company might, with the consent of shareholders thereby prescribed, attach to all or any of the shares to be created under the powers of the Act any preferential dividend; provided that such dividend should not exceed £5 per cent. on the amount for the time being paid up; any deficiency not to be made up out of the profits of any subsequent year.

It was also (sect. 9) enacted that all such new shares should be offered to "the then holders of shares or stock in the company;" and (sect. 12) that if at the time of the creation of new shares the existing shares or stock were not at a premium, then such new shares might be of such amount, and might be issued in such manner, as the company should think fit.

By sect. 16 the company was empowered to borrow on mortgage an additional sum not exceeding £10,000, but no part of that sum was to be borrowed "until the whole of the additional capital by this Act authorized to be raised by new shares is *bond fide* subscribed for or taken, and one half thereof is paid up, and until the company shall prove to the justice who is to certify . . . before he so certifies, that all such additional capital has been subscribed for or taken *bond fide*, and is held by the subscribers or their assigns, and that such subscribers and their assigns are legally liable for the same; and by sect. 17 it was provided that all existing mortgages should have priority.

On the same day the following letter was signed and sent:

"25, *Parliament Street, Westminster, S. W.*

"13th July, 1863.

"Dear Sir,—We, the undersigned, as directors of the *Watford and Rickmansworth Railway*, agree to become personally responsible to the *Union Bank* to the extent of £4000, now required for the claims due on the company.

"To *J. Beattie, Esq.*

"*Union Bank, Temple Bar.*

"*F. F. Jeyes, Secretary.*"

"*Ebury.*

"*Joseph Cury.*

On the 22d of January, 1864, *Beattie* wrote as follows to the defendant *Forbes*, who, in the the previous November, had become, and then was, the secretary of the company:

"In the month of March last, under permission of the directors, I endeavored to unravel the accounts of this company, with a view to finding out what had become of the large amount of cash drawn from this bank. After several attempts I gave the matter up for the time, and relying upon the promises of the board that the bank debt should be the first charge upon the preference shares and debentures, about to be raised by a bill then in Parliament, I have been anxiously waiting some communication for months in fulfilment of this promise, and in default of the same I have to ask you to call an early meeting of 783] the directors for the *purpose of covering my debt with such an amount of shares and debentures, as collateral security, as may be sufficient."

On the 26th of February, 1864, *Forbes* wrote to *Beattie*, stating that the coupons for the half year's interest due on the 1st of March on the company's mortgage deeds would be presented at the bank, and requesting, on behalf of the directors, the manager to give instructions that they might be paid, debiting the company with the various amounts, as on previous occasions.

From the minute book it appeared that the amount of the coupons being about £325, on the same 26th of February a resolution was passed by the company's directors that for that sum "the undersigned directors do hereby give their personal guaranty.

"*Ebury*,
 "*Joseph Cary*, } Directors.
 "*Reg. Capel*, }
 "*Alex. Forbes*, Secretary."

In answer to the last mentioned letter, *Beattie*, on the 27th, wrote to say he could not pay the interest on the debentures without the personal undertaking of the directors; and on the 29th *Forbes* replied, inclosing the required undertaking, the receipt of which as "a personal undertaking" was acknowledged by *Beattie*.

Throughout the same year repeated applications were made on behalf of the bank for liquidation of the debt.

On the 18th of November, 1864, *Forbes* wrote inclosing to *Beattie* a guaranty. This was in the form of a letter signed by Lord *Ebury* and Mr. *Dillon*, whereby the writers requested the manager to place at the company's credit at the bank the sum of £1000, for which (they said) "we hereby give our guaranty."

At length, on the 8th of December, 1864, *Beattie* wrote to *Forbes* as follows:

"Dear Sir,—The delay in settling the large amount due to this bank causes my directors considerable uneasiness, and I have been directed to apply to you for a transfer of at least £20,000 of the unissued preference shares into the joint names of myself and *J. A. Barton, Esq.*, of 2, *Princes Street, Mansion House*, to be held for the bank as collateral security; and I am to request at the same *time that your unissued debentures are to be transferred to the same names, you undertaking to do this when you are in a position to issue them. As my directors meet on Wednesday next to audit the accounts of this branch, it is most important that I should be in a position to report that their wishes had been complied with, requesting you to bring this before your board, which I understand has a meeting to-morrow."

At a meeting of the company's directors on the 9th of December, the following minute was entered:

"Read letter, dated the 8th instant, from Mr. *Beattie*, the manager of the *Union Bank*, stating that he has been instructed to apply to the company for a transfer of at least £20,000 of the unissued preference shares of the company into the joint names of himself and *John Arthur Barton, Esq.*, of No. 2, *Princes Street, Mansion House*, to be held for the bank as collateral security for the debt owing from the company, and to request that at the same time the company's unissued debentures be transferred to the same names, and that an undertaking be given to them that this shall be done when the company are in a position to issue shares and debentures. Resolved, that the secretary be instructed to reply to Mr. *Beattie's* letter that his suggestion will be complied with."

On the 20th of December, 1864, *Forbes* wrote to *Beattie* as follows:

"Dear Sir,—I submitted your letter of the 8th instant to the directors, and I am instructed to inform you that they will have no objection to carry out the arrangement you suggest, and have instructed me to allot the shares you name to Mr. *Barton* and yourself, to be held by you as collateral security for the debt owing to the bank." The letter concluded by expressing regret for the delay which had occurred.

On the 28th of December, 1864, Mr. *Alexander Dobie*, solicitor to the *Union Bank*, addressed a letter to the secretary of the company, pressing for payment of "the long outstanding and large" amount due, and threatening proceedings.

On the same 28th of December, 1864, a general half-yearly meeting of the company was held, at which it was resolved "that the directors be and are hereby authorized to issue the new

785] preference *capital, £30,000, in shares bearing dividends at the rate of £5 per cent. per annum, subject to the conditions of the Act of 1863, and to the regulations of the company; and that the shareholders already on the books of the company shall be offered allotments prior to the disposal of the shares otherwise by the directors;” should they decline, and the surplus share remain unallotted, then that the directors be authorized to sell, cancel, “or otherwise dispose of the same in such a manner as they may deem most advantageous to the company, and may also, in like manner, dispose of the debentures.”

On the 3d of January, 1865, *Forbes* wrote to *Beattie* as follows:

“Reverting to the proposal contained in your letter of the 8th ult., and to its acceptance by my directors, conveyed to you by my letter of the 20th ult., I have now to acquaint you that the issue of the new preference shares having been finally sanctioned at the half-yearly meeting of the company, held on the 28th ult., I am now prepared to place the shares and debentures named in your letter in your possession, as collateral security to the bank for the debt owing, pending some more definite, and I trust speedy, arrangement for the liquidation of that debt. I propose, as the course usually adopted in such cases, to register such shares, &c., in the names of two of the directors of the company, who will execute a transfer of them to you and Mr. *Barton*, on a mutual understanding that they are to be held by you only as collateral security to the bank. On hearing from you that you agree to this, the shares and debentures shall at once be prepared and sent to you.”

Beattie replied on the 9th:—“In reply to your letters of the 3rd and 9th inst., I beg to say I am quite prepared to accept the shares and debentures as collateral security pending your disposal of them. In no other light would they be taken by the bank.”

On the 18th of January, 1865, it appeared from the minute book that at a board meeting of the company's directors proposals were submitted for sealing the below mentioned preference shares and mortgage deeds, “to be lodged with the *Union Bank* as a collateral security for the debt owing by the company, in accordance with the suggestion in Mr. *Beattie's* letter of the 8th of December, and agreed to by the board's resolution of the 9th.”

786] * “Twenty certificates for £1000, representing preference shares, Nos. 1 to 2000, for £10 each.

“Ten mortgage deeds, 16 to 25, for £1000 each, due the 1st of March, 1870, with coupons attached, for interest due thereon half-yearly.

"All the above shares and deeds issued to Lord *Ebury* and Mr. *Dillon*."

"Submitted also two deeds of transfer, conveying the above shares and debentures from Lord *Ebury* and Mr. *Dillon* to John *Beattie* and John Arthur *Barton*, such deed to be executed by Lord *Ebury* and Mr. *Dillon* in accordance with the arrangement made with Mr. *Beattie*.

Resolved that the share certificates and mortgage deeds above particularized be sealed.

"The documents were accordingly sealed and attested.

"Resolved, also, that deeds of transfer conveying these deeds and shares to Mr. *Beattie* and Mr. *Barton* jointly, to be held by them as collateral security for the bank debt, be executed by the chairman and Mr. *Dillon*.

"The deeds were accordingly executed and attested.

"Resolved, that the deeds and share certificates be now forwarded to Mr. *Beattie* as collateral security for the debt owing to the bank, as arranged between him and the secretary, and in pursuance of Mr. *Beattie's* letter of the 8th, and the secretary's reply of the 20th of December."

On the same 18th of January, 1865, *Forbes* wrote to *Beattie* as follows:

"In pursuance of the arrangement suggested by your letter of the 8th ult., and agreed to on the part of the directors of this company by my letter of the 20th ult., I have now the pleasure to forward you herewith the undermentioned preference share certificates and mortgage deeds standing in the names of Lord *Ebury* and Mr. *J. W. Dillon*, two of our directors, accompanied by deed of transfer executed by the above gentlemen in favor of yourself and Mr. *J. A. Barton*, to whom the said debentures are assigned as collateral security for the debt owing to the *Union Bank of London* by this company, viz., twenty certificates of £1000 each, *representing 5 per cent. preference shares, [787 Nos. 1 to 2000 for £10 each; ten mortgage deeds for £1000 each, numbered respectively 16 to 25, bearing interest at £5 per cent. from the 1st inst., until the date of the expiration of the deeds on the 1st of March, 1870, and for the payment of which interest ten coupons payable half-yearly on the 1st of March and 1st of September in each year are attached to each deed."

Each of the certificates inclosed in the last-mentioned letter certified that Lord *Ebury* and *Dillon* were the proprietors of the ten preference shares numbered — to — of the company, nothing being stated as to the amount paid up. By each mortgage, which was under the seal of the company, it was witnessed that in consideration of £1000 paid to them by Lord

Ebury and *Dillon* the company assigned to Lord *Ebury* and *Dillon*, their executors, administrators, and assigns, the undertaking, and all the rates, tolls, and sums of money arising by virtue of the two Acts of Parliament, until the said sum of £1000 and interest from the 1st of January, 1865, at the rate of £5 per cent., should be satisfied; the principal sum to be paid on the 1st of March, 1870. Attached to each deed were ten coupons for interest.

The deeds of transfer of the shares and the mortgages were in the common form.

A letter acknowledging the receipt of these documents "to be held as a collateral security for the debt owing to the bank," was on the same 18th of January sent by *Beattie* to *Forbes*; and on the 30th of January *Beattie* and *Barton* returned the transfers executed by them, with a request that they might be registered.

On the 4th of February, *Forbes* sent to *Beattie* certificates of transfer for the shares and debentures. Indorsed on the back of each was the following memorandum:

"Notice.

"The preference shares" (or "mortgage deeds,") "within referred to, are transferred to Mr. *John Beattie* and Mr. *John Arthur Barton*, to be held by them as collateral security for moneys owing by the *Watford and Rickmansworth Railway Company* to the *Union Bank of London*, and the holders thereof are not entitled to vote at meetings of the company, or to use these 788] shares" (or "are not entitled *to use these deeds,") "in any other way than as such collateral security for the said moneys owing to the said *Union Bank of London*."

The certificate of a justice required by the 16th section of the Act of 1863 had never been obtained, and the company at the time of these transactions had not any authority to borrow money on debentures. The security thus given to the bank was therefore not available.

The bank subsequently brought an action against the company, and on the 25th of March, 1865, judgment was signed for £32,408 6s. 9d. On the 25th of December, 1865, the directors served a notice on the bank claiming a lien personally on the deposited securities. On the 8th of January, 1866, an elegit was issued under which was realized £212 18s. 4d. The directors also paid the sums for which they had made themselves liable by written guaranties, but there remained a large sum due to the bank.

On the 8th of August, 1868, the bill in the present cause was filed to make the five directors personally liable for the sum due to the bank, to have the transfer of the shares and debentures

cancelled, and to have the names of *Beattie* and *Barton* removed from the register of shareholders.

Vice-Chancellor *Bacon* made a decree directing an account of what was due from the company to the bank, and declaring the directors personally liable to pay to the bank what was due from the company to the bank. The decree went on to direct the transfers of the shares and debentures to be cancelled, and the names of *Beattie* and *Barton* to be taken off the register of shareholders (').

(') 1872. Mar. 6.

SIR JAMES BACON, V.C. :

This suit is brought by the *Union Bank of London*, and persons who represent the interest of that bank, against five of the directors of the *Watford and Rickmansworth Railway Company*, the secretary, and the company. The plaintiffs seek to enforce the payment by the directors of a sum of upwards of £20,000, and they further ask that certain debentures and certain transfers of shares in the company, which have been made to and in the names of the first-named plaintiffs, may be cancelled, and that the names of the same plaintiffs may be removed from the register of shareholders.

These several heads of relief arise out of the series of transactions stated in the pleadings and evidence ; but as they are different in kind, and depend upon somewhat different considerations, it appears convenient to deal with them separately.

The railway company was incorporated by the "*Watford and Rickmansworth Railway Act, 1860*," and in that Act the first-named five defendants (except the defendant *Dillon*), were with other persons named as, and the same four defendants ever since and the defendant *Dillon*, since his appointment in August, 1861, have continued to be, directors of the company.

The *Union Bank* were appointed and acted as the bankers of the company, and on the 4th of July, 1860, the directors, at a board meeting, resolved that all checks should be signed by two directors, and countersigned by the secretary for the time being. In pursuance of this resolution, three of the directors signed, and there was transmitted to the bank an order or authority in these terms:—[His Honor read the authority as stated above.]

Checks were accordingly drawn in the manner specified, and were paid by the bank ; and in the result a very large

sum became due to the company. Many communications took place between the manager of the bank and the directors with reference to this account ; the bank desiring payment of, or security for, the sums due to them, and the directors not having the means of complying with the requests of the bank, the available resources of the company being then all exhausted.

Now it is upon this state of things that the bank, in the first instance, found their claim against the directors. The bank insist that the written authority to which I have referred amounted, in effect, though not in express terms, to a representation by the directors that the company were legally empowered to borrow or take up the sums which had been drawn for by the checks, and that the company would pay such amount as might become due in respect of them ; and that, inasmuch as the company had failed to fulfil their engagement, the directors, upon whose authority the advances were made by the bank, are now personally liable to pay the debt, and make good the default of the company ; and that, in this view of the case, it is wholly immaterial whether the company were or were not legally competent to borrow moneys beyond the amount limited by their Act of incorporation.

The other head of relief which the plaintiffs advance requires a fuller statement. The Act of 1860 authorized the company in the usual manner to raise a capital of £40,000 by the issue of 4000 £10 shares, and to borrow £18,000 on mortgage or bond. Before the end of 1863 the company had constructed the railway, had issued all but 600 of the shares, had exercised their borrowing powers, and were moreover very considerably in debt. It was necessary therefore, for them to apply to Parliament for authority to raise additional

789] *The directors appealed.

Sir *Roundell Palmer*, Q.C., Mr. *Fry*, Q.C., and Mr. *Speed*, for the appellants :

As to the letter of the 4th of July, 1860, it is clear that the sums ; and accordingly a bill had been prepared by them for this purpose.

Matters stood thus when, in December, 1862, the manager of the bank pressed the directors for payment of the amount due, and, after an interview with the five first-named defendants, he wrote to them a letter on the 19th of December containing this passage :— [His Honor read the request contained in the letter set out above.] At a meeting of the directors held on the 19th of December the receipt of this letter was acknowledged by them, and their then secretary was instructed to reply to the manager, consenting to his application. The secretary did so reply, and in his letter said :— [His Honor read the passage extracted above.]

The only shares which then remained unissued were 600 ordinary shares, and which were afterwards allotted to and registered in the name of the manager, the plaintiff, Mr. *Beattie*; but upon his finding that such allotment and registration had exposed him to personal liability, and did not constitute such collateral security to the bank as he had by his letter applied for, he filed a bill against the directors, and the company, to have his name removed from the register. In that suit a decree was made in January, 1869, by which he was declared not to be a shareholder, and his name was removed, as he had prayed. It is, therefore, unnecessary to refer further to this topic.

In July, 1863, the company obtained another Act of Parliament: [His Honor referred to the preamble of the statute, and to the clauses relating to shares and mortgages. These will be found extracted. His Honor continued :]

Nothing further having been done respecting the bank's debt, in January, 1864, the manager wrote to the defendant, *Forbes* (who had then become the secretary of the company) to the effect that he had been relying upon the promise of the board, and asking the secretary to call an early meeting. [The letter of the 22d of January, 1864, is stated above.]

The directors and the secretary pro-

mised to do what was thus required, but, delay having ensued, the manager, on the 8th of December, 1864, wrote again to the secretary, thus :— [His Honor read the letter, the minute embodying the resolutions passed on the 9th of December, and Mr. *Forbes'* letter of the 20th of December, 1864.]

At about the same date Mr. *Dobie*, the solicitor to the bank, wrote to the secretary, requiring immediate payment of the amount due by the company to the bank, and threatening legal proceedings. This fact the secretary communicated to the directors at their board meeting held on the 28th of December, 1864. He informed them also that he had duly carried out the intentions of the board, and had, on the 9th instant, written to Mr. *Beattie* the letter of the 20th of December just referred to. Whereupon the directors resolved :— [His Honor read the resolution of the 28th of December, 1864, also the letters of the 3rd and 9th of January, 1865, the resolution of the directors, and the two letters of the 18th of January, 1865; and described the form of the documents which were sent on that day.]

The manager having required certificates of the registry on the company's books of the transfer of the debentures and shares, Mr. *Forbes*, on the 4th of February, 1865, sent to the manager certificates in this form, indorsing upon each of them a notice showing the purpose for which they had been transferred :— [His Honor read the form of certificate and the indorsement as above.]

In the share register of the company these shares were entered as belonging to "Lord *Ebury* and Mr. *Dillon*," with this memorandum (see above). The mortgages were also entered in the company's register with this note (see the note above).

Neither at this nor at any other time had the certificate of the justice, required by the 16th section of the Act of 1863, been obtained, nor was the company authorized to borrow any sum whatever on mortgage.

On the 25th of December, 1865, the

*bank never considered it a guaranty, for they took after- [790
wards several limited personal guarantees from directors, which

solicitors for the directors served upon the bank and their manager the following notice: "In the name of all the directors we are instructed to give you notice that in consequence of certain arrangements which had been entered into between the *Watford and Rickmansworth Railway Company* and Lord Ebury, Joseph Vary, Esq., and the other directors, those gentlemen now claim a lien upon the preference shares and debentures of the company now on deposit at the *Union Bank*, subject to any prior lien or claim the bank may have thereon. And they further give you notice that upon payment of the sums in respect of which you now hold the same as security, they will require you to cause the said preference shares and debentures to be transferred into their joint names, or to such person or persons as they shall jointly nominate."

I believe I have now stated all the transactions which are material to the subject of this suit. There have been various other proceedings between the bank and the company. The bank brought an action, and in March, 1865, obtained judgment against the company for £33,408; but the debt is disputed in a suit referred to in the pleadings, and which is still pending. Subsequently a sum of £9436 was paid by some of the directors in respect of a direct personal liability incurred by them. A writ of *elegit* was afterwards issued by the company, upon which a sum of £212 was recovered. But there remains due to the bank a large sum, as the plaintiffs allege and as the defendants admit, exceeding £20,000, in respect of their advances; and it does not appear necessary for the present purpose to advert more particularly to these matters.

All the facts I have hitherto stated are admitted or proved in evidence. The defendants, the directors, and the company, and Mr. *Forbes*, the secretary, have answered separately.

The directors, against whom the principal relief is prayed, admit that the *Union Bank* "became the bankers of the company," and that "they did" but, as the directors say, "well knowing what were the powers of the said company, and at the request of the said company, through the then secretary and

solicitor, *F. F. Jeyes*, and the directors of the said company, and upon checks signed by such directors, or some of them, on behalf of the said company, pay various sums of money to or on behalf of the company, and for the purposes of the company; and all of the said sums were duly applied to the purposes of the said company accordingly." Upon these grounds it has been argued on behalf of the directors that they did not, by the authority of the 4th of July, 1860, incur any personal responsibility. On the part of the plaintiffs it is contended that the bank were under no obligation to see or to inquire into the ability of the company to contract a debt by borrowing; that it was to them wholly immaterial whether the company could validly contract a debt, or whether they had the means of satisfying the debt—for that the written authority referred to, acted upon as it was, amounted to a representation by the directors that the company were enabled to contract the debt—and an undertaking that, being contracted, such debt should be paid—and, as a consequence, that, the debt remaining due, the directors, upon whose representation it was contracted, are personally liable to pay it.

Many cases were referred to in the course of the argument for the purpose of showing that persons who had trusted companies not authorized to borrow or to contract certain other forms of debt, must bear the consequences of their own want of caution, and remain without any enforceable remedies against such companies—and their can be no question that such is the well established law. But I take it to be no less clear that if any agent, or any other person acting on behalf of a company, so acts that, without any words to that effect, his acts amount to a representation that he has authority to enter into the contract upon which the dealings which may be in question are based, he incurs a personal liability to make good such representation. If the authority to draw checks had been under the seal of the company, the signature or checks by the directors would have exposed them to no personal liability—because such drawing would have been merely in the exercise of their lawful

would have been useless if this letter had been a general one. 791] A man *is personally liable for misrepresentation if, without authority, he enters into a contract professedly on behalf

ministerial powers, and would have been referable only to the original authority given by the company. But the transaction here is of a wholly different character. I do not dwell upon what is said on the part of the plaintiffs, that the bank in their dealings had reliance upon the high position and the reputation for honor and probity of the directors—because, although I have no doubt that what is so said is perfectly true, such reliance is not enough of itself to impose upon the persons so trusted a legal liability; but, since it is the settled law that persons making representations upon which others are induced to deal with them are bound to make good such representations to their full extent, I cannot hesitate to say that the directors have personally incurred that liability which is sought to be enforced against them in this suit. The authorities for the principle of law to which I have last referred are so numerous and so well known (indeed *Collen v. Wright* (8 E. & B., 647) and many others were mentioned in the course of the argument) that it would be a useless occupation of time to cite them more particularly. There are, however, two which I think it right to point attention to. The first is *Richardson v. Williamson* (Law Rep., 6 Q. B., 276) in which it was decided that the directors of a company which had no power to borrow money, had, by signing a receipt acknowledging the deposit of money with the company, to be repaid on demand, in effect represented that they had authority to make a binding contract on behalf of the company, and had become personally responsible to repay the sum so received.

The other is *Cherry v. Colonial Bank of Australasia* (Law Rep. 3 P. C. 24), where two of the directors of a mining company, having written to a manager of a bank a letter in which they stated that they, as directors, had "authorized" one *Clarke* "to draw checks upon the account of the said company," and the company disputing their liability, the bank brought an action against the directors, in which they recovered a verdict, which was ultimately fixed at the amount which became due to the bank in respect of

sums overdrawn by the manager subsequent to the date of the letter.

Upon these authorities, then, I think that, in respect of all advances made by the bank after the 4th of July, 1860 the defendants, the directors, are bound, by reason of the authority of the 4th of July, 1860, to make good the amount due to the bank, incurred upon the faith of that authority.

There remain to be considered the facts relating to the transfer to the two first-named plaintiffs, as trustees for the bank, of the preference shares and the mortgages. As to these, the plaintiffs insist that, having regard to the correspondence and the documents I have mentioned, the defendants, the directors, and their secretary, *Mr. Forbes* must be taken to have represented as facts that the things which were so transferred were good and valid securities for the whole amount of the debt which was due at the time of the transfer, and which still remains due—such facts being in themselves untrue, and being known by the persons so representing them to be untrue. The defendants, on the other hand, contend that the plaintiffs have had all they ever asked for or expected; that the manager in the first instance asked for the shares, under the first Act, which remained unissued, and that this request was complied with; that he further required a transfer of unissued preference shares, to be held as collateral security, and unissued debentures, as soon as the company were in a position to issue them, and that such last mentioned shares and debentures were duly transferred to him; that the object of the bank and its trustees was to obtain dominion over the shares and debentures, so that the moneys payable in respect of them could not be received by the company without the knowledge of the bank, and so that such moneys should be applied in reduction of the bank's debt; that for this purpose the manager required that "forms" of certificates and mortgages should be lodged in his hands as trustee for the bank, to be held by him as collateral security for the repayment of the debt; that he objected to the shares being registered in his name, and required that they

of another: *Collen v. Wright* ⁽¹⁾; but if he enters avowedly as agent into a contract by *which his principal is bound, he [792

should be registered in the names of two of the directors, and transferred to him, and that such transfer should be lodged with him, together with the before mentioned "forms"; that the bank was at this time without any security, or any acknowledgment of the company's indebtedness, except the debit entries in the company's pass-book; and that the manager therefore urged that he should be in possession of the shares and debentures, as much by way of acknowledgment of the indebtedness of the company as by way of security for the debt.

The defendants, the directors, further state that, the matter having been discussed, it was thought fair and equitable that the bank should have the security they asked for in respect of their debt; that the defendants, Lord *Ebury* and Mr. *Dillon*, permitted their names to be used simply as trustees for the company; that they never contracted to become *bond fide* proprietors of the shares and mortgages, and that it was understood by all parties that they were to be indemnified and held harmless by the company and the bank, and that they should incur no responsibility of any kind either to the company, the bank, or their trustees. They deny the representations alleged by the plaintiffs to have been made to them, and assert that the bank and their trustees were aware that nothing had been paid, or was intended to be paid, by Lord *Ebury* and Mr. *Dillon*.

The statements I have referred to are denied by Mr. *Beattie*, in his affidavit made in the cause, and are affirmed by the answers of the defendants, the contents of which are verified by their respective affidavits. None of the witnesses have been cross-examined, with the exception of Lord *Ebury*, whose personal recollection of the matters in dispute appears to be imperfect, but who has admitted that the advances were made upon the checks of the directors, and that the shares and mortgages were handed over to prevent the bank from taking the proceedings they had commenced and threatened to pursue, and after he had been served with a writ at the suit of the bank.

In this state of circumstances, the documentary evidence, and that of the surrounding circumstances, is all that the company can rely upon. On the part of the plaintiffs, it is contended, that, although the evidence does not amount to proof of a verbal or personal representation by the directors, that the transfers were good securities, yet the documents themselves, the correspondence, the minutes of the directors, and the acts they did, have the effect in law of fixing upon the directors a liability to make good the representation thereby conveyed, that the instruments deposited were good collateral security for the debt due to the bank.

The question to be determined is, therefore, whether this contention is well founded, or whether the view suggested by the directors in their answer is that which the Court ought to adopt. Now I must say I find it impossible to conclude, from the undisputed evidence, that the bank or their manager ever meant to be satisfied with the mere possession of "forms" of certificates or mortgages, or with anything less than available and substantial security for the amount admitted to be due to them. With a large debt owing to them, the payment of which had been delayed, which was urgently demanded by them, and for recovering which they had taken, and threatened, legal proceedings, the directors purport to comply with their demand that they should be put into possession of security for their debt. For this purpose, and in order, as it is admitted, to avert the threatened proceedings, documents which are called by the name of "securities," and by no other name, are handed by the directors to the bank. These securities consist of certificates of shares under the seal of the company, representing that Lord *Ebury* and Mr. *Dillon* were "the actual proprietors of" those shares. There is nothing on the face of the certificates to express or imply that the £10, the amount of each share, had not been paid. They are accompanied by formal transfers under the hand and seal of the persons who were stated in the certificates to be "the proprietors of" the shares. Together with these cer.

(1) 8 E. & B. 647.

is not under any liability; and even where he had no authority he is not liable to fulfill the contract, but is only liable for the

tificates are the mortgages, executed in like manner, each of them purporting to be made in consideration of £1000 paid to the company, acknowledged by the company's seal, and confirmed by the signature of the secretary; and the transfers of these mortgages are also executed by the two directors; each and every of these things having been resolved upon and done by the directors at their board meeting. At a later period, when the bank applied for a certificate that the several instruments had been registered in the books of the company, the secretary sends such certificates, with indorsements upon them stating that, as to the mortgages, they were to be held by the plaintiffs as collateral security, but that the plaintiffs were not entitled to use them in any other way; and, as to the shares, that they also were to be held as collateral security, but that the holders were not entitled to vote at meetings of the company, or to use the shares in any other way than as such collateral security. Besides all this, the directors in a body caused a notice to be served upon the bank, claiming, on behalf of the directors, a lien on the shares and mortgages — as if they were real and actual securities — and requiring the re-transfer to be made into their joint names on payment of the debt. It is under these circumstances that the defendants, the directors, insist that the bank, which demanded security for their debt, ought to be satisfied with having received things which are no securities, but only the empty "forms" of securities.

Now, having regard to the principles of law established by the cases relied on by the plaintiffs, and which may be shortly stated to be, that persons dealing in matters of direct personal interest, and making representations upon the faith of which others are induced to advance moneys, or to forbear the enforcement of just demands, or otherwise to act, are bound to fulfil such representations, I find it impossible to say that the defendants, the directors, did not represent to the bank that, in consideration of their forbearing to resort to legal proceedings for compelling payment of their debt (a debt for which the directors were already personally responsible), they would transfer to

them valid securities. Can it be said that their representation was true in fact, or that, by the manner in which the directors dealt, the bank received from them any security whatever? It is admitted that no money had been paid by the directors whose names appeared in respect of either the shares or the mortgages. It is admitted that the company had no power to make any such mortgages. Neither class of the so called securities is worth more than the paper on which they are written, and the whole of the dealing is as substantial as a dream.

In this state of things, I am of opinion that I am bound to say that the defendants, the directors, have incurred the liability to pay, and that they must be decreed to pay to the bank, the whole amount remaining due to them, and to take back the utterly worthless instruments which were transferred as I have mentioned.

The company, who are also defendants, repudiate the authority of the directors to issue the shares as security to the bank, and they insist that the indorsement on the certificates of transfer to the bank was *ultra vires*, and not binding on the company. They assert that nothing has ever been paid to them in respect of the shares, and that the bank must be taken to have accepted the shares in respect of which they say that £20,000 is due to the company; and further, that they never had power, under the second Act, to borrow moneys on mortgage, and never authorized the creation of such mortgages. They go further by their answer, at considerable length, into several matters relating to the judgment obtained against them by the bank, the validity of which they dispute, and to proceedings in other suits pending, which, as they are not within the scope of the present suit, it is unnecessary to notice further; and they have also contended that the plaintiffs are not entitled to have their names removed from the register of shareholders in the company, or that if, in any event, it should be held that the plaintiffs are so entitled, they must pay the costs thereby occasioned, and the company's costs of this suit.

I have nothing to do, at present,

amount of damages occasioned by the *alleged principal [793 not being bound, which in this case is nothing. Here, however, the company was liable, for judgment has been recovered by the bank against the company, which is *conclusive: [794 *Williams v. St. George's Harbor Company* (¹). The directors throughout were acting within the scope of their powers to bind the company, even taking the letter to authorize the overdraw. *ing the account, which we say it did not, being nothing [795 but a direction to the bank as to what should be the proper signature to checks. The fact that the company was liable disposes of *Richardson v. Williamson* (²) and *Cherry v. Colonial Bank of Australasia* (³). The cases of *Horsley v. Bell* (⁴) and *Higgins v. Livingstone* (⁵), which were cited against us below, have no bearing; they were *cases of direct contract for [797 the performance of certain works. The overdrawing a banking account in the ordinary course of business does not come under the head of borrowing: *In re Cefn Cilcen Mining Company* (⁶); *Waterlow v. Sharp* (⁷); *Gibbs & West's Case* (⁸); so it is hard to make out any mis-statement at all, and if there was, it was a mere misrepresentation of a matter of law, and to such the doctrine as to making representation good does not extend: *Rashdall v. Ford* (⁹).

Then as to the other branch of the case, we say that, looking at the correspondence, it is clear that the bank were not misled

with any questions which may exist or may arise between the company and the directors, but I think the plaintiffs are well entitled as against the company, in whose name, under whose seal, and by the acts of whose directors the several dealings with shares and debentures of which the plaintiffs complain have been conducted, to the relief which they ask, to have their names removed from the company's register; inasmuch as no valid contract ever existed between the plaintiffs and the company in respect of those dealings, and they are, in my judgment, wholly ineffectual, and are to be treated as never having taken place.

The decree, therefore, will contain a declaration to the effect that the transfers of the shares and of the mortgages by the directors to the plaintiffs are wholly null, and an order that they be cancelled. An account must be taken of what is due from the company to the bank for principal and interest, and an order made for payment of the amount which shall be found due by the defendants to the bank, together with the plaintiffs' costs of the suit; and thereupon

the certificates of shares and debentures will be delivered up by the plaintiffs to the persons by whom they were deposited without prejudice to any questions between the co-defendants. It will be further declared that the entry of the names of the plaintiffs in the register of the company was improperly made; and ordered that such entry be forthwith cancelled, and that the defendants do all such acts as may be necessary or requisite to effect such cancellation. Considering the part which has been taken by the secretary in issuing the debentures, at a time when he must have known that no such debentures could be lawfully issued, I can give him no costs of the suit, nor can I give any costs to the defendants, the company.

(¹) 2 De G. & J., 547.

(²) Law Rep. 6 Q. B., 276.

(³) Ibid. 3 P. C., 24.

(⁴) Amb., 770.

(⁵) 4 Dow., 341.

(⁶) Law Rep., 7 Eq., 88.

(⁷) Ibid., 8 Eq., 501.

(⁸) Ibid., 10 Eq., 312, 318, 319.

(⁹) Ibid., 2 Eq., 750.

by any representation, and in fact only bargained for this, that the unissued shares and debentures should be placed in their hands so that when they were issued the money must come to the hands of the bank. The bank perfectly knew that they were not at the time an available security, and the claim made by this bill is a mere afterthought.

The *Solicitor-General* (Sir G. Jessel), Mr. *Swanston*, Q.C., Mr. *Wood*, Q.C., and Mr. *T. A. Roberts*, for the plaintiff:

As to the first point, there is no difference in principle between this case and *Cherry v. Colonial Bank of Australasia* ⁽¹⁾. There was, by the letter, a representation that all drafts signed in the way there mentioned would bind the company. A person who makes a representation must make it good, whether he knows it to be incorrect or not: *Rawlins v. Wickham* ⁽²⁾; nor is *mala mens* a necessary ingredient in the equity: *Slim v. Croucher* ⁽³⁾.
798 [*They also referred to *In re Cork and Youghal Railway Company* ⁽⁴⁾ and *Kisch v. Central Railway Company of Venezuela* ⁽⁵⁾.]

As to the second point, the bank bargained for security, not for what had only the form of a security, and was, in fact, worth nothing: *Chumbers v. Manchester and Milford Railway Company* ⁽⁶⁾. The directors represented that what they were giving was a security, and this representation they must make good.

Mr. *Kay*, Q.C., and Mr. *Locock Webb*, for the company.

At the close of the respondent's argument on the 11th of July, their Lordships adjourned the case, stating that they would give timely notice in case they should think it necessary to hear a reply.

July 29. SIR G. MELLISH, L.J.:

This is a suit brought by the managers and one of the registered public officers of the *Union Bank of London* against five directors and the secretary of the *Watford and Rickmansworth Railway Company*, and also against the railway company itself.

The suit, so far as the directors are concerned, which is the only part of it to which this appeal relates, is a claim on behalf of the *Union Bank* that the directors may be made personally liable for a sum of about £22,000, a debt due from the *Watford and Rickmansworth Railway Company* to the bank from their having overdrawn their account.

The claim is founded upon this: it is said that the directors made representations on the faith of which the bank acted, that these representations were untrue, and that consequently they must in this Court make good those representations. The first

⁽¹⁾ *Ibid.*, 3 P. C., 24.

⁽²⁾ 3 De G. & J., 304.

⁽³⁾ 1 D. F. & J., 518.

⁽⁴⁾ *Law Rep.*, 4 Ch., 748.

⁽⁵⁾ 3 D. J. & S., 122; *Law Rep.*, 2 H. L., 99.

⁽⁶⁾ 5 B. & S., 583, 609.

representation, on which the Vice-Chancellor has determined against the directors, is a representation that the directors had authority to bind the railway company by entering into a contract with them for loans, and to overdraw their account, and also a representation that the railway company would pay, and that these representations were not fulfilled. The second, and which, *as far as the bill is concerned, is obviously the main [799 ground of the suit, is that certain shares and debentures were transferred by the railway company to the *Union Bank* as a security for their debt, and that the directors represented that they were valid shares and valid debentures fully paid up so as to form a valid security for the debt, whereas in fact they were totally unpaid up, and were no security at all.

The facts as to the first part of the case may be shortly stated thus: In July, 1860, on the day after the passing of the Act of Parliament which constituted the railway company, three of the directors, Messrs. *Cary*, *Capel*, and *Warwick*, signed and sent to the bank the following documents: "To the directors of the *Union Bank of London*, or their Manager, at the *Temple Bar Branch*. Gentlemen — *Watford and Rickmansworth Railway* — Please to honor the cheques of this company signed by two of the directors, and countersigned by the secretary. Dated this 4th July, 1860." One of those directors, Mr. *Warwick*, is not one of the defendants, and Mr. *Dillon*, who is a defendant, was not at that time a director at all. That document having been sent, the account was thereby opened between the railway company, and the *Union Bank*, and the allegation in the bill is, "The said *Union Bank of London* were duly appointed and became the bankers of the company, and, at the request of the directors, paid various sums of money to and on behalf of the company and for the purposes of the company, and all such moneys were applied for such purposes accordingly." The bill then goes on to state that the directors and the company having in the month of December, 1862, become largely indebted to the bank, the bank required payment. Thus the bill alleges that all the moneys which were drawn out were drawn out on behalf of the company, and were applied for the purposes of the company.

Then the debt having been so incurred, for some part of the debt, which was a debt for precise loans, the directors were asked to give and did give their personal guaranties, and in March, 1865, the bank sued both the company and the directors to recover the money due. Thereupon the directors paid a sum of about £10,000; which represented the sum they had guaranteed, but for the rest of the money the bank recovered judgment against the railway *company. After that they [800

issued an elegit, and they recovered all the money that they could recover. There has, it appears, been a suit in Chancery for the purpose of administering the affairs of the company, and in that suit, as well as in this suit, the railway company allege that they are not bound by this overdrawing of the account, but, nevertheless, up to the present time no bill has been filed to set aside that judgment, though it was obtained so far back as March, 1865.

The question is, on those facts, are the directors personally liable for making a representation to the manager of the bank to the effect that they had power to overdraw the account, that representation being untrue? The Vice-Chancellor has decided that they are so liable on the authority of three cases, which are all cases in the Courts of Law, and which come to this, that where an agent makes a contract on behalf of his principal he impliedly warrants that he has authority to bind that principal, and if it turns out that he has no authority to bind his principal and the principal repudiates the obligation, and loss is thereby occasioned then an action on that warranty can be maintained. But if those cases are examined it will be found in all of them that there was a misrepresentation in point of facts as to the agent having power to bind his principal, and though I have not found any case in the Courts of Law on the question, I have no doubt myself that it would be held that if there is no misrepresentation in point of fact, but merely a mistake or misrepresentation in point of law, that is to say, if the person who deals with the agent is fully aware in point of fact what the extent of the authority of the agent is to bind his principal, but makes a mistake as to whether that authority is sufficient in point of law or not, under those circumstances I have no doubt that the agent would not be liable. For instance, supposing when an agent comes and professes to make a contract on behalf of his principal, instead of trusting his representation that he has power to bind his principal the person dealing with the agent were to ask to see his authority, and a power of attorney executed by the principal was shown to him, and he took the opinion of his lawyer as to whether the power of attorney was sufficient to bind the principal, and was advised that it was sufficient to bind the 801] principal, and then after that a contract was *made, and it turned out when the point was raised in a Court of law that the power of attorney was insufficient—under such circumstances I am clearly of opinion that there would be no warranty on the part of the agent that the power of attorney was good in point of law.

I will shortly state the three cases which were relied upon before the Vice-Chancellor to show that they all involve a mis-

representation in point of fact. The first case mentioned on the subject was *Collen v. Wright* ⁽¹⁾. That was a simple case, where the steward of a gentleman executed an agreement for a lease in his name, and when a suit was brought for specific performance it turned out that a gentleman had never given any authority to the steward to make an agreement for a lease in his name. Specific performance was therefore refused. The plaintiff then brought an action against the steward to recover damages, and was held entitled to recover. There it is perfectly plain that the defendant had made a misrepresentation in point of fact.

The next case was the case of *Richardson v. Williamson* ⁽²⁾. There the plaintiff lent £70 to a benefit building society, and received a receipt signed by the defendants, as two of the directors, certifying that the money had been lent, and then it turned out that in point of law they had no power to borrow money. But, then, their power to borrow money depended upon whether they had made a rule to borrow money, because a benefit building society may receive money, at any rate to a certain amount, on deposit, if it has a rule enabling it so to receive money. Therefore that was taken as a representation by the directors that they had such a rule, and that the borrowing was within the rule when, in point of fact, there was no such rule at all.

Then the third case, and the one which I think has been principally relied upon in the argument before us, was *Cherry v. Colonial Bank of Australasia* ⁽³⁾. There the directors of a joint stock company gave authority to their manager to overdraw the account. If the facts of the case are examined it will be found that the directors had power to borrow money, provided they got the consent of a meeting of the shareholders but not otherwise. *There was, therefore, a misrepresentation in point [802 of fact, because when they represented they had power to borrow they practically represented they had obtained authority from a meeting of the shareholders to enable them to borrow.

Now, although I have found no case at law, there is a case in equity which clearly shows that the rule in this Court is that a person cannot be made liable for making a misrepresentation unless it is a misrepresentation in point of fact, and not merely in point of law. I think anybody would be startled if it was said that if you asked somebody what was the law upon a particular point, and he gave you his opinion as to what the law was, and you acted upon it and altered your position, a bill could be maintained against him to make good the representa-

⁽¹⁾ 8 E. & B., 647.

⁽²⁾ Law Rep., 6 Q. B., 276.

⁽³⁾ Law Rep., 8 P. C., 24.

tion, if his opinion turned out to be wrong. The case I refer to is *Rashdall v. Ford* ⁽¹⁾, the head note to which is as follows: "The plaintiff alleged, that being desirous of advancing money on debentures, he applied to a secretary of a railway company who wrote offering him a bond of the company for £1500, and stating that the company were not yet in a position to issue permanent debentures; but that they expected to be able to do so in four or five months' time. With the letter was sent a prospectus, from which it appeared that the company was incorporated by Act of Parliament, and that three persons named were directors. Plaintiff advanced the money and received in return a *Lloyd's* bond, signed by the secretary, whereby the company purported to acknowledge the debt, and to covenant to pay the same with interest at 6 per cent. The company having ceased to pay interest, and being in difficulties, plaintiff filed a bill against two of the three directors, and the representatives of the third, praying that they might be decreed to pay the amount advanced by the plaintiff, with interest: Held, that the principle of relief on the ground of misrepresentation by third persons did not extend to an incorrect statement of a matter of law, and demurrer by the representatives of the third director allowed." Now, in that case, as far as regards there being a representation that they had power to bind the company, there was as direct a representation as could possibly be conceived. The plaintiff offered to lend money to the *company and the company said, we will give you a *Lloyd's* bond as security, and they gave him a *Lloyd's* bond as security. According to the authorities, that was a representation that they had power to bind the company by a *Lloyd's* bond, but because, as a matter of law, a *Lloyd's* bond is not a good instrument binding upon the company when it is given for money borrowed, and as it was as much the business of the plaintiff as of the directors to know what the law was, it was held that no suit could be maintained.

I have stated what I conceive to be the law on this point, because the Vice-Chancellor has not gone into the question as to whether the representation, if there be one, by the directors of the company in this case, that they had power to bind the company by borrowing money and overdrawing the account, was a misrepresentation of fact. Now, what do the words of the letter of the 4th of July, 1860, amount to? I must confess that this document appears to me nothing but the common ordinary notice which directors of a joint stock company or a railway company would send when they intended to open an account with a bank. No doubt it contains representations of fact. It is headed "*Watford and Rickmansworth Railway*;" that is a re-

(1) Law Rep., 2 Eq., 750.

presentation that the railway company had obtained their Act of Parliament, and was an incorporated railway company. It is signed by three directors; that is a representation that those three persons are directors; and I think when it says, "Please to honor the cheques of this company signed by two of the directors, and countersigned by the secretary," that is a representation that the directors had agreed to open an account with the *Union Bank*, and that the checks which would be drawn upon that account would be signed by two of the directors and the secretary. Does it represent anything more? What does it represent respecting the authority of the directors to overdraw? Does it represent more, or could it be understood by the manager of the bank to represent more, than that they had the ordinary authority, whatever that may be, of railway directors to bind the company? It surely does not represent, and could not be fairly or properly understood to mean, that the directors of the *Watford and Rickmansworth Railway Company* had some power to bind their company beyond that which the *directors of other railway companies in the kingdom have. [804] It appears to me that there is no representation made respecting the authority, except that they were directors of the railway company, and therefore had such authority as the directors of a railway company have, and I cannot think that the manager of the bank understood it in any other sense. Then if that was so, there is no misrepresentation in point of fact in the document, and that is an answer in my opinion to the first ground.

I am not quite certain whether the Vice-Chancellor did not think that there was a representation that the company would pay, so as to make them liable upon the misrepresentation simply because they have not paid. I do not say that with certainty, for after reading his judgment I am not quite clear what the ground was on which he really proceeded. If he did proceed on that ground, I should remark that there is a clear difference between a misrepresentation in point of fact, a representation that something exists at that moment which does not exist, and a representation that something will be done in the future. Of course, a representation that something will be done in the future cannot either be true or false at the moment it is made, and although you may call it a representation, if it is anything, it is a contract or promise. The directors cannot be liable on the ground that the company have made default, and have not paid the amount, unless according to the true construction of this document it amounts to a guaranty. It is perfectly plain that it does not amount to a guaranty, and moreover I think it perfectly plain that the *Union Bank* never considered it to amount to a guaranty, for when they wanted a guaranty from

the directors (and for a very considerable part of the sum they did require the guaranty of the directors), they asked them to give a separate guaranty, which shows that unquestionably they never relied on this document as a guaranty.

If it were necessary, there appears to me to be another answer to this part of the case, viz., that there is nothing to show that the directors had not power to bind the company; and at all events there is nothing to show that the bankers have not got all the benefit which they would have had if the directors had had power to bind the company. The Solicitor-General, as I understood him, put his argument thus: He said that directors ⁸⁰⁵ cannot bind their company by borrowing money, even from a bank, but they may bind them by drawing checks in payment of debts which have been properly incurred, although the account is thus overdrawn. Whether that is a correct statement of the law or not, I do not think it necessary in this case to give any opinion, because the authorities on the subject do not agree very well with each other, and the question is one of considerable difficulty; but supposing that to be the law, there is not the slightest evidence that the directors made any misrepresentation in point of fact. Whenever the company told the bank they wanted a loan they made a loan; and in the pass-book, when they were loans, they were headed "Loans," and it is by no means clear that the whole of the loans have not been repaid by the directors. In respect of the other sums, there is not an atom of evidence to show that the whole of those other sums which were not direct loans were not overdrafts, which, according to the rule laid down by the Solicitor-General, would be perfectly legal, viz., drafts drawn to pay the debts due by the company. In fact, the bill alleges that they were so, and therefore there is no case made upon that ground.

Again, it is to be observed that the bank brought their action, recovered judgment, and issued execution against the company. What further benefit could they have obtained had it been perfectly clear that the directors had power to bind the company? Seven years have elapsed, and I should be very much surprised if after such a lapse of time as this any bill would be successful which might be filed by any shareholder of the company for the purpose of setting aside that judgment — a perfectly honest judgment — for a debt for which the company had received full consideration. It appears to me, for that reason also, that the directors are not liable on the first ground on which the Vice-Chancellor rested; for supposing them to have represented — which, in my opinion, they did not — that the directors had power to bind the company by borrowing money, the bank have not sustained damage to the amount of a shilling by the absence

of such a power, inasmuch as they have had every remedy against the company which they could have had if such power had existed.

The second ground upon which the plaintiffs rely is this: *After the debt had been incurred, the bank very natu- [806 rally became anxious as to how it should be paid, and a correspondence took place which ended in the directors transferring to two of the managers of the *Union Bank*, in trust for the bank, £20,000 preference shares which they had been authorized to raise by the second Act which was passed in 1863, and £10,000 debentures. The plaintiffs contend that the directors represented that these were paid-up shares and paid-up debentures — valid shares and valid debentures — and are bound to make good the loss arising from the fact that that representation was not true.

Upon this part of the case the first thing to be decided is what — according to the true construction of the letters which passed between the manager of the bank and the secretary of the railway company — was the security which the railway company agreed to give the bank? The plaintiffs contend that the company agreed to allot the shares and issue the debentures to persons who had given full consideration for those shares and debentures, and then to procure those persons who had so received the shares and debentures to transfer them to the trustees of the bank. On the other hand, the defendants say that there never was any agreement to that effect, but all that was intended was that the company should place these shares and debentures under the control of the bank, and give the bank the power of issuing them; so that if there were any persons among the public who were willing to take the shares or the debentures at their full price, then the bank should, by having the shares and debentures standing in the names of trustees for them, have security that the money paid by the public in taking them up should come through the bank, and so go in satisfaction of their debt. When I say “paid-up shares,” it is necessary to distinguish between shares which have actually been paid up and shares which may be entered as paid up; for one possible view of some of the letters which passed is that the secretary of the company thought that these shares and debentures might be legally entered as paid up, and transferred as paid-up shares and debentures. He might very well have thought so, without thinking that anybody would pay the amount in cash, or give full value for them. Although this would clearly be a mistake in law, it would not be a very extraordinary mistake. If the debt *to the bank was, as I am disposed to think it was, a good [807- debt, the bank might have agreed to take the shares or the de-

bentures in satisfaction of that debt; and if they had so taken them, that would have made them paid up shares and paid up debentures, and it would not be an extraordinary mistake for any one to suppose that if they were transferred, not in satisfaction but as security, that nevertheless the debt due from the railway company to the bank would justify the railway company and the bank treating them as paid up shares. I only state that as one of the possible explanations of these letters.

But I must proceed to read the letters for the purpose of seeing which of the two views is correct, and what was the real contract between the railway company and the bank as to giving security.

The first letter was written in December, 1862, by Mr. *Beattie* to Lord *Ebury*: [His Lordship read the letter of the 19th of December, 1862.]

This letter obviously was written before the company obtained the second act, and when they intended to obtain it. What is the meaning of that passage, "that your board will undertake to hand to the bank such preference shares and debentures as you may obtain the authority to raise in next session of parliament?" It appears to me that that clearly bears the meaning which the defendants put upon it. This is very important, because this is the beginning of the negotiation, and this is the letter written by the manager of the bank himself. It seems to me utterly impossible that Lord *Ebury* when he read this letter could have supposed it to mean that Lord *Ebury* or some of the other directors should pay up to the railway company the full value of those shares and debentures and then transfer them to the bank. It seems to me that it means what the defendants say, that the company should give the bank the power of issuing the preference shares and the debentures, so that if the public took them up the bank might get the money. The minute entered in the minute book is this: "Mr. *Beattie* attended on behalf of the *Union Bank* to make arrangements with regard to the debt due to the bank, and a letter was subsequently received from him to which Mr. *Jeyes* was instructed to reply consenting to his application." The answer by the secretary was this: 808] [His Lordship read the secretary's letter, which is given above.] I cannot conceive this to mean anything more than what I have said, that the bank was to have the power of issuing the shares and debentures so as to obtain the money which the public might give on taking them up.

The next letter is one from Mr. *Beattie*, dated the 22d of January, 1864, after the second act had been obtained: [His Lordship read this letter and the letter from *Beattie* of the 8th

of December, 1864, the minute of the 9th of December, 1864, and the letter of the 20th of December, 1864, from *Forbes to Beattie*.]

Now what is the bargain made in that last letter? Reliance was placed on the use of the word "transfer" in the proposal made. "I have been directed to apply to you for a transfer of at least £20,000 of the unissued preference shares." Who were to execute the transfer? No doubt the company. The letter is written to the secretary. There is not a word in these letters that I can see from beginning to end which raises any suggestion that either the directors or any one else were to come under any personal liability. If what was understood was, that some person who had paid full value or had given full consideration was to give up his own property for the purpose of securing the bank, surely it would have been stated in plain terms. When we find letters written by the manager of the bank simply asking the directors in their character of directors of the railway company to give security, surely that must mean such security as the directors in their character of directors can give. It was quite obvious that the company had no power to pay up their own shares, and to transfer them as paid up. All that they could do was to give the bank the power of issuing the shares, so that when the shares were taken up, if they ever were taken up, the money would come into the bank. It may be quite true that it was a very imperfect security; there is nothing to show that the bank did not treat it as a very imperfect security, they gave no consideration, they did not bargain to give any time, and in point of fact they did not give any time (for these letters having been written in 1864, and the transaction completed in January, 1865, the bank commenced their action, and got their judgment in March following). They were simply asking the company to give such security as they could. Then, if we look at the answer of the secretary the matter appears to be made perfectly clear, for he has translated the expression "trans- [809
ferred into the joint names of myself and Mr. Barton" as follows: "I am instructed to inform you that they (the directors) will have no objection to carry out the arrangement you suggest, and have instructed me to allot the shares you name to Mr. Barton and yourself." It was therefore understood that the shares were to come direct from the company. The shares and debentures, however, were not in fact allotted direct to the manager of the bank, but were first allotted to Lord Ebury and Mr. Dillon, and perhaps it is right to show, as far as it can be done, how that came to pass.

I may observe that on the 28th of December, whilst these negotiations were going on, Mr. Dobie, the solicitor of the bank, wrote a letter to the secretary simply demanding payment of

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the money. Then on the 3d of January there is this letter from the secretary of the railway company to *Beattie*:— [His Lordship read the letter.]

Now looking to this letter, when the secretary says: "I propose, as the course usually adopted in such cases, to register the shares in the names of two of the directors of the company, who will execute a transfer of them to you," could Mr. *Beattie*, or any one who understood the letter and read the letter have possibly supposed that these two directors were to pay full value for the shares. That is what the plaintiffs now contend for—their case being that Lord *Ebury* and Mr. *Dillon*, the two directors into whose names these shares were transferred, and from them transferred to the two managers of the bank, represented that they had given full value for those shares. But when we look at the words, "I propose as the course usually adopted in such cases to register the shares in the names of two of the directors," can any one possibly suppose that those two directors had paid up the full amount of the shares and debentures? The next letter is this, from Mr. *Beattie*:—"In reply to your letters of the 3d and 9th inst., I beg to say I am quite prepared to accept the shares and debentures as collateral security pending your disposal of them. In no other light would they be taken by the bank." Does not this show that the bank perfectly understood the proposal in the sense now contended for by the defendants, for the bank in fact say by this letter: "You may transfer the shares and debentures into the names of trustees 810] for us, and if you dispose of them then the *persons who give the money for them will come to us and get the transfer from our trustees, and so the money will come to us." I cannot but think that if there had been any doubt upon any of the other letters that last letter would have made the matter quite clear.

Then we have a letter from the secretary of the railway company to Mr. *Beattie* on the 18th of January:— [His Lordship read that letter.] It is quite impossible that that letter or the heading of the document could alter the bargain and the undertaking contained in the previous letters.

Reliance was placed on the form of the certificates and the form of the debentures. The certificates are in a form which does not show whether they are paid up or not. The debentures, no doubt, are in the common form, as if they were paid up, which debentures always are. I think, indeed, that if the directors had sold these shares and debentures in the market there would have been an implied warranty that they would have been available as shares and debentures, and that they were paid up;

but I think that here the terms of the negotiation between the parties exclude any such warranty.

The conclusion I come to upon the whole of this case is, that from the beginning to the end Mr. *Beattie* knew the whole circumstances of this railway company just as much as the directors themselves knew them; that there was no concealment from him, and that there was no deception in point of fact, and no mistake in point of fact. Whether there was any mistake in point of law, whether, for instance, either party supposed that these might be treated as paid up shares and paid up debentures, although they were not paid up, I do not know; but it appears to me that Mr. *Beattie* must have known from the nature of the transaction the real state of the facts.

I do not go into the evidence, which is somewhat contradictory, as to what passed at interviews between Mr. *Beattie* and Mr. *Forbes*. I think this case is to be decided on the written documents which were shown to, seen by, and acted upon by the directors, and that it is wholly immaterial to consider what passed between the secretary and the manager in private.

No doubt the directors had not power to issue debentures, because they had not got a certificate from a magistrate, [811 and they could not get a certificate until the shares were paid up; but in my opinion Mr. *Beattie* knew that these shares were not paid up, and therefore knew that in point of law the time had not come when the debentures could be issued. Upon the whole, therefore, I have come to the conclusion that the directors did not make any misrepresentation in point of fact, and that the managers of the *Union Bank* were not deceived by any alleged misrepresentation; that consequently the case against the directors fails and as against the directors who have appealed the bill must be dismissed with costs.

SIR W. M. JAMES, L.J.:

I am entirely of the same opinion.

Solicitors: Mr. *Dobie*; Messrs. *Baxter, Rose, Norton, & Co.*; Mr. *W. Clarke*.

EQUITY CASES.

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M.R. April 24, 26, 1872.

*POWELL v. SMITH.

[Law Reports, 14 Equity Cases, 85.]

1871 P. 100.

Specific Performance — Mistake — Agreement for Lease for Seven or Fourteen Years — Option of Lessee — Authority of Agent.

The Court will not refuse to decree the specific performance of an agreement on the ground that one of the contracting parties has mistaken its legal effect.

Accordingly, where a lessor's agent had contracted to grant a lease for seven or fourteen years, which the lessor understood to mean a lease determinable at the lessor's option, and alleged that the agent had acted without authority:

Held, that the lessee was entitled to have the agreement specifically performed, and to have a lease for fourteen years, determinable at his own option at the end of seven years:

Held, also, that the lessee having been put into possession of the farm under the agreement, the lessor was precluded from disputing the agent's authority.

THIS was a suit for the specific performance of an agreement for a lease.

In September, 1870, the plaintiff, *William Powell*, entered into negotiations with *T. H. England*, who acted as agent for the defendant, *Ernald Mosley Smith*, with the view of taking a lease of a farm belonging to the defendant, and lately in the occupation of **L. Whitwell*, and an agreement was entered into between them which, so far as material, was as follows:

"Terms agreed upon this 1st day of October, 1870.

"Lease to be for 7, 14, or ——— years from the 29th of September, 1870.

"Rent £145 per annum for the farm, as late in *Mr. Whitwell's* occupation.

"The valuation to be made by *Mr. Rutley* of the tenant right and other matters under the clauses of *Mr. Whitwell's* agreement, and the amount thereof paid by *Mr. Powell* on his taking possession of the farm, or as may be arranged.

"The house and buildings to be put into tenantable repair by *Mr. Smith*, and to be kept and left so by *Mr. Powell*.

"Signed, *T.H. England*.

"*Wm. Powell.*"

The plaintiff alleged that in part performance of the said agreement the defendant let him into possession of the said farm as tenant thereof under the said agreement, and that on the faith of the said agreement, and in part performance thereof, the plaintiff paid £616, being the balance of the valuation made by *Rutley*, and that the plaintiff had ever since been in occupation of the farm as tenant thereof, on the footing of the

said agreement, and had laid out large sums in the improvement of the farm.

The defendant, however, refused to grant him a lease for more than seven years without inserting a power for the landlord to determine the same at the end of seven years.

The plaintiff accordingly filed his bill on the 8th of June, 1871, praying that the defendant might be decreed specifically to perform the said agreement of the 1st of October, 1870, and to grant a lease to the plaintiff of the said farm for fourteen years, on the terms mentioned or referred to in the said agreement.

The defendant admitted that the agreement was executed in the terms above mentioned, but stated that when *England* signed it he was only authorized to make, on his behalf, an agreement with the plaintiff to grant him a lease of the farm for a period determinable at the option of either party at the end of seven or fourteen years, and that he had no authority to agree to grant a lease determinable *at the option of the plaintiff only; [87 he insisted that such was the true construction of the agreement, but that if it purported to grant such a lease as the plaintiff claimed it was made without his authority, and was one which he had never ratified, and which did not express the real intention of the parties signing it.

It appeared from the evidence that the defendant had an estate of about 3000 acres, and that all his leases to other tenants were determinable at the end of seven years, at the option of either party. The plaintiff, however, deposed that he was not aware at the time of the agreement of any such provision being inserted in the other leases granted by the defendant, and that he signed the agreement with the full understanding and belief that the lease would only be determinable by himself.

The bill prayed that the defendant might be decreed specifically to perform the agreement of the 1st of October, 1870, and to grant a lease to the plaintiff of the said farm for a term of fourteen years according to the terms and conditions of the agreement.

Mr. *Southgate*, Q.C., and Mr. *Cozens Hardy*, for the plaintiff:

By the terms of the agreement of the 1st of October, 1870, the plaintiff was entitled to a lease of fourteen years, determinable at the end of seven years at the option of the lessee. It is clearly settled that the legal effect of a contract for a lease for seven, fourteen or twenty-one years is that it is determinable at the shorter period by the lessee only: *Dann v. Spurrier* ⁽¹⁾; *Doe v. Dixon* ⁽²⁾. In *Price v. Dyer* ⁽³⁾, which was a suit for specific performance of an agreement for a lease for seven, four-

⁽¹⁾ 8 B. & P., 399.

⁽²⁾ 9 East, 14,

⁽³⁾ 17 Ves., 856.

teen, or twenty-one years, a similar defence was set up to that raised in the present case; and it was sought to resist specific performance on the ground that the contract was varied by a subsequent parol agreement that the lease should be determinable at the option of either party. It was there assumed that the option rested with the lessee only, and the Court held that the legal effect of the written instrument must stand notwithstanding the variations verbally agreed upon.

In *Swaisland v. Dearsley* ⁽¹⁾, where a plaintiff sought to set aside a contract on the ground of mistake, and it appeared that the [88] *description of the property was ambiguous, it was held not to be enough for the plaintiff to swear that there had been a mistake where no ground for such mistake appeared on the particulars of sale. In the present case there was not a mistake of fact, but of law, which is no defence, to a suit for specific performance.

The question then arises, whether the defendant can set aside the contract because, as he alleges, he never authorized his agent, Mr. *England*, to make it for a lease which the lessee could determine. We submit that the evidence fails to show that the agent acted without authority; but even if he did, his contract has been ratified by the defendant's subsequent conduct. Where a contract has been signed on behalf of another, who does not at the time assent to it, but who, after he knows what the contract is, does not within reasonable time disavow it, his assent will be presumed: *Bigg v. Strong* ⁽²⁾. So where a principal act on the contract entered into by his agent beyond the scope of his authority, he cannot afterwards dispute his agent's authority, to enter into it: *Stuart v. London and North Western Railway Company* ⁽³⁾. Here there was a clear ratification, as the defendant allowed the plaintiff to take possession of the farm under the agreement, and to pay the outgoing tenant for the stock.

On these grounds we submit that the defence raised by the defendant wholly fails, and that the plaintiff is entitled to a decree.

Sir *R. Baggallay*, Q.C., and Mr. *Phear*, for the defendant:

We do not dispute the authority of *Dann v. Spurrier* ⁽⁴⁾ and the other cases relied on by the plaintiff; for where an agreement for a lease for seven, fourteen, and twenty-one years *simpliciter* is entered into, the presumption is that it is to be determined at the option of the lessee. But the Court will look at all the surrounding circumstances. In the present case the defendant is owner of a considerable estate, and it appears by the evidence that in all his leases a clause is inserted making

⁽¹⁾ 29 Beav., 480.

⁽²⁾ 3 Sm. & Giff., 592; 4 Jur. (N S), 983.

⁽³⁾ 15 Beav., 513, 520.

⁽⁴⁾ 3 B. & P., 399.

them determinable at the lessor's option only. This may be relied on as confirming the defendant's evidence that this agreement was made under a misapprehension.

*The way in which the Court will deal with contracts [89 where one of the contracting parties proves that he has entered into it in a different sense from the other was considered in *Wycombe Railway Company v. Donnington Hospital* ⁽¹⁾, where, speaking of the way in which a vendor had understood the contract, Lord Justice *Knight Bruce* observed: "It is sworn by the vendor's agent that this was his sense and understanding. It would be contrary to the rules of this Court to enforce specific performance against a defendant ~~so~~ swearing, and in fact so proving."

Further, the defendant's agent, Mr. *England*, was never authorized to enter into an agreement for such a lease as that to which the plaintiff now claims to be entitled. In *Manser v. Back* ⁽²⁾, which was a suit by a purchaser to enforce specific performance of a contract entered into by an auctioneer by mistake for the sale of property, as to part of which his authority had been revoked, it was held that it was competent to the vendor to insist upon such revocation, and that parol evidence was admissible in support of that defence.

Swaissland v. Dearsley ⁽³⁾ was cited on the other side; but we contend that it is an authority in our favor, for it was there held that the contract could not be enforced. In *Webster v. Cecil* ⁽⁴⁾, where the vendor had by mistake inserted a wrong sum for the purchase money, that was held to be sufficient to prevent a contract from being enforced.

In *Harris v. Pepperell* ⁽⁵⁾ your Lordship observed: "Where a deed is not actually executed the Court will not enforce specific performance of a contract which one party has entered into under a mistake." The mistake in this case being proved, and the agent having acted without authority in making the agreement in these terms, we submit that it cannot be enforced.

LORD ROMILLY, M.R.:

I am of opinion that this is not properly a case of mistake at all. In those cases in which agreements have been set aside on the ground of mistake, there has been a mistake as to the agreement *which has been entered into. That is not the case [90 here for the words of the agreement are not disputed on either side; nay, more, shortly after the agreement was entered into, it was so far ratified that under it the plaintiff was actually put into possession of the farm. All those cases which have been

⁽¹⁾ Law Rep., 1 Ch. 268, 273.

⁽²⁾ 29 Beav., 430.

⁽³⁾ 6 Haro., 443.

⁽⁴⁾ 80 Ibid., 62.

⁽⁵⁾ Law Rep., 5 Eq., 1, 4.

cited during the argument are cases where there was either a dispute and doubt as to the thing sold, or where the words of the agreement expressed certain things in an ambiguous manner, which might be misunderstood by one of the parties. In all those cases the Court has held that it must look at the evidence, and that if the mistake is sufficiently proved the Court will then set aside the agreement. But here the words of the agreement are quite certain, and the only thing that was not understood was the legal effect of certain words which it contained. Now that is no ground of mistake at all. It is a question upon the construction of an agreement agreed to by everybody concerned.

The construction of the agreement is unquestionable. When it says, "for seven or fourteen years," those words allow the lessee to have an option of saying whether he will give it up at the end of the seven years. Upon that there is no question whatever. Therefore it is not, as was stated here, a mistake as to the contract which was entered into, but that a person entered into an agreement, the legal effect of which he did not know at the time. But the legal effect of a contract upon the true construction of the words, is a matter by which he is bound. Here the defendant has acted upon this agreement. He was aware that the plaintiff took possession of the farm a few days afterwards, and paid the outgoing tenant for the stock on the farm.

If it could be proved that the plaintiff knew that the defendant never granted leases in which he did not reserve the option of determining the leases to himself as well as to his lessees, according to the form adopted by some large landed proprietors, then another ingredient might arise, namely, that of fraud in taking advantage of that which, though it was understood by him, was not stated. But the plaintiff says in effect, "Here is the agreement, and all I come to you for is to execute a lease in conformity with the agreement;" and then the defendant says, "I did not mean the agreement to have its legal effect." 91] Could he have alleged *that the agreement was not binding on him, so that he was not bound to execute a lease in conformity with it? It is clear from the authorities cited by Mr. Phear that where the Court sees there can be no mistake, it will not, on such a ground as here alleged, set aside the contract or interfere to prevent its specific performance.

Besides, in the cases referred to one important ingredient in considering whether the Court will set aside a contract has been this—Can the parties be put in the same position in which they were before? In the present case that cannot be done, for the plaintiff cannot be put in the same situation now as if the agreement had been carried into effect for a lease of the farm

two years ago. In all these cases time is of the essence of the contract. Moreover, this is not a case in which the plaintiff should be left to his remedy at law, for it is the object of suits in this Court to make the decision final, and it would be difficult to ascertain the extent of the particular damage which the plaintiff has sustained, or what he might have obtained elsewhere if he had not entered into this contract.

Here the defendant by his agent has adopted a certain form of agreement, and then when he finds out that it gives certain rights which he did not intend, he wishes to put an end to it. But this Court considers that every one entering into such a contract is bound to know what the law is, and as the defendant entered into it with his eyes open (assuming that he is bound by the acts of his agent) he cannot set it aside because he finds the construction of it is against him.

I am quite clear also that the defendant has assented to Mr. *England's* contract, and that his acts have put the plaintiff into possession. The result is that the plaintiff is entitled to a decree, and to have a lease for seven or fourteen years, determinable at his option at the end of seven years.

Solicitors for the plaintiff: Messrs. *May & Sykes*.

Solicitors for the defendant: Messrs. *Taylor & Baxter* agents for Mr. *W. H. Rowland Croydon*.

V.-C. M. May 1, 2, 6, 7, 1872.

*MACKAY V. DOUGLAS.

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[Law Reports, 14 Equity Cases, 106.]

1867 M., 111.

Voluntary Settlement — Creditor's Suit — Settler about to engage in Trade — Liabilities incurred since Date of Settlement — 13 Eliz. c. 5 — Inspectorship Deed — Release — Concealment.

A voluntary settlement whereby the settler takes the bulk of his property out of the reach of his creditors, shortly before engaging in trade of a hazardous character, may be set aside in a suit on behalf of creditors who became such after the settlement, though there are no creditors whose debts arose before the date of the settlement, and though when the settlement was made it was doubtful whether the arrangements under which the settler was to engage in the business would take effect.

Where a voluntary settlement is made on the eve of the settler engaging in trade the burden rests upon him of showing that he was in a position to make it.

In order to set aside a voluntary settlement as being void as against creditors, it is not necessary to show that the settler contemplated becoming actually indebted. It is sufficient if he contemplated a state of things which might result in bankruptcy or insolvency.

A debtor is not entitled to set up, as a defence to a suit to set aside a voluntary settlement, a release contained in an inspectorship deed by which he vested all his property in the inspectors, the settlement or the existence of the property comprised in it not having been disclosed at the time the inspectorship deed was executed.

THIS was a suit praying that a voluntary settlement affected by two deeds of the 24th of February, 1864, might be declared void as against the creditors of the settler under the Act of 13 Eliz. c. 5, and for consequential relief.

The plaintiffs sued on behalf of themselves and all other creditors of the settler, and the defendants were the settler and the trustees of the settlement. *William Douglas*, the settler, was originally a merchant's clerk, and his salary, which had been gradually raised from £200 a year, amounted in the year 1864 to £500 a year. He was then a managing clerk in a firm of merchants carrying on business in *London* and *Liverpool*, and also, in partnership with other persons, at *Calcutta*. The style of the *London* firm was *James Smith & Co.*; that of *Liverpool*, *William Grant & Co.*; and that of *Calcutta*, *Grant, Smith & Co.* The principal members of the firm were, at the time, *James Smith* and *William Grant*, and there was also a partner named *James Steel*, and other persons were interested in some of the branches of the business.

The defendant *Douglas* had married about the year 1858; at the date of the settlement in question in the suit he had no children, but one was born shortly afterwards. At the time of his marriage he had no property capable of being put into settlement, but according to his statement he had by the year 1863 saved, out of his salary, and certain sums which had been given him out of the profits of certain transactions in jute which he had conducted on behalf of his employers, sufficient money to enable him to purchase the lease of a house at *Islington*, in which he intended to reside, known as No. 28, *Highbury Hill*. He at all events did purchase the lease, which was now valued at about £1800. He signed the contract on the 30th of October, 1863, and the assignment to him was made on the 2d of November, 1863.

In the latter months of the year 1863 negotiations were commenced between the partners, *James Smith* and *William Grant*, for the purpose of enabling *William Grant* to retire from the partnership; and it was also arranged between *James Smith* and *William Douglas* that if the proposal were carried out the latter would be taken into the partnership. The matter was so far arranged that an agreement was signed on the 1st of October, 1863, by *William Grant* and *James Smith*, which provided that *William Grant* should retire, and *James Smith* pay him £70,000 for his interest in the business. Some difficulty, however, arose [108] in finding the £70,000, *and the arrangement was not concluded at the time. The plaintiffs, however, sought to establish as part of their case that the admission of Mr. *Douglas* as a partner was virtually determined upon before the close of

the year 1863. For this conclusion they relied, amongst other things, upon a letter written by Mr. *Douglas* to Mr. *Smith*, on the 11th of September, 1863, in which the following passage occurred: "I am much obliged for the inquiry in the latter part of your note. *Grant* writes me that he will be in town on Wednesday, when he also expects to see you here, and I will then speak to you fully on the subject. If *Grant* retires altogether from *Calcutta* business I would be very glad indeed if you could come to an arrangement with me here. But I have still my doubts whether *Grant* will retire; only there has been so much lately of deciding one way, and then deciding in another, that I had made up my mind to wait quietly till something was actually agreed upon."

These arrangements, however, remained unconcluded; and in the meantime, on the 19th of January, 1864, the defendant *Douglas* had some conversation with his solicitors with respect to making some settlement on his wife and family; and on the 24th of February following he gave them complete instructions to prepare a settlement of his leasehold house. This was effected by means of two indentures, both dated the 24th of February, 1864, by the first of which, after reciting that he was desirous of making some provision for his wife, he, in consideration of natural love and affection for her, assigned the leasehold house to the three remaining defendants as trustees, with a discretionary trust for sale, and to hold the house, or the proceeds of the sale of it, upon the trusts of the indenture of even date. These trusts were, in substance, for his wife for life for her separate use, and after her death, if he should not have become bankrupt or have incumbered the same, to pay the income to himself until he should be outlawed or become bankrupt, or should assign, charge or incumber, or attempt or affect to assign, charge or incumber, the dividends, interest and income, or some part thereof; or should or might suffer something whereby the same or some part thereof might through his act or default, or by operation or process of law or otherwise, if belonging absolutely to him, become vested in or payable to some other person or persons; and a discretionary trust was given [109 to the trustees as to the application of the income in case of the determination of the trust during his life. Then followed the usual trusts in favor of the children of the marriage, and an ultimate trust for the defendant *Douglas*, his executors or administrators absolutely.

These deeds were executed, on or about the day on which they were dated, by *Douglas* and the trustees. On the 8th of April, 1864, the partnership arrangements were completed as far as the *London* and *Liverpool* firms were concerned, and by a

deed of that date made between *James Smith*, who was the only continuing partner, and himself (it being provided that the remaining English partner, *James Steel*, should retire at the end of the year), he became a partner in those firms for three years from the first of May, 1864.

On the 1st of May, 1864, the defendant *Douglas* left *England* for *Calcutta*, with the view of taking the chief management of the branch of the business carried on there; and on or about the 8th of August, 1864, a deed was executed in *India* by means of which he became a partner in that firm also, and he remained in *India* till the early part of the following year.

The firms in *England* soon became embarrassed, their difficulties arising principally, according to the statement of the defendant *Douglas*, from injudicious management, during his absence in *India*, of some speculations in jute which had been commenced before he became a partner and for which he considered that he was not personally responsible; and in November, 1864, it became necessary for them, if they were to continue their business, to raise a sum of £40,000. This sum was raised under an agreement dated the 14th of November, 1864, by which the late partner *William Grant*, mortgaged his interest in 327 *Hooghly Steam Tug Company's* shares, and *James Steel*, who was about to retire, mortgaged certain shares in a tea plantation company and other property, and *William Grant* agreed to become again a partner as from the 1st of January, 1865. On resuming this position *William Grant* went to *Calcutta* to manage the *India* branch of the business, and in February, 1865, the defendant *Douglas* returned home. He stated in his answer that on his return he discovered that in consequence of the liabilities 110] *which had necessitated the agreement of the 14th of November, 1864, and from several imprudent transactions which had been entered into during his absence by *James Smith* and *James Steel*, in breach of a covenant contained in the agreement of the 14th of November, 1864, the business of the *London* and *Liverpool* firms had become hopelessly embarrassed, and that stoppage of payment must ensue. Accordingly these firms stopped payment in April, 1865; and in February, 1866, the *Calcutta* firm, which appeared to have been in a solvent condition so long as it was under the management of the defendant *Douglas*, also stopped payment. The liabilities of the English firms amounted altogether to £348,147 4s. 6d.

On the 15th of March, 1865, a deed of inspectorship was executed for the purpose of winding up the business of the English firms, under which the plaintiffs, who were creditors, were appointed inspectors. *James Smith* and *William Douglas*, therein called the debtors, covenanted with the plaintiffs, in effect that

they would get in and convert into money their joint and separate estates under the inspection of the plaintiffs, and as the plaintiffs should require, and under the like inspection divide the proceeds arising from such estates rateably amongst the creditors. And it was further, amongst other things, provided that the estate should be administered in accordance with the then bankruptcy law in *England*, or as near thereto as circumstances would permit; and clause 20 contained the following provision: "that at any time before the whole of the said estate shall have been fully administered the said debtors and each of them shall, if the said inspectors shall require the said same, convey, assign, and assure all the estate and effects of the said co-partnership firms and each of them, and also all their and his estate and effects remaining outstanding and not divided, to such person or persons as they may direct, in trust to be administered according to the law of bankruptcy among the said creditors respectively, and if any ultimate surplus shall remain after full payment and satisfaction of all debts or claims, and of all costs, charges, and expenses hereby authorized to be paid, or otherwise provided for, then as to such ultimate surplus in trust for the said debtors and each of them according to their and his right and interest therein."

*Clause 22 was as follows:

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"That if and when the said estate shall have been fully administered according to the provisions thereof to the satisfaction of the said inspectors, they may certify the fact in writing under their hands, such writing to be endorsed upon or to refer to these presents; or in case all the estate and effects of the said co-partnership firms and each of them and of the said debtors and each of them shall be conveyed, assured or assigned in pursuance of these presents and in the manner thereinbefore provided, such fact may in like manner be certified; and thereupon and thenceforth these presents (except only for the purpose and to the extent in the present clause hereinafter provided for, and without prejudice to the rights of the said creditors respectively, to or over the property so thereinbefore conveyed or assigned), or to or over any dividends or funds for dividends then provided but not actually paid to the said creditors respectively, shall operate and be a release and discharge to the said debtors and each of them, their and each of their heirs, executors, and administrators, as fully and effectually and in like manner as an order of discharge granted to them respectively under such joint adjudication as aforesaid, and may be pleaded and used accordingly and as a bar to and in defence of all actions, suits, and proceedings in respect of any of the debts, claims, and demands of all or any of the said

creditors respectively. Provided nevertheless, that in case at any time after such conveyance and assignment the said co-partnership firms or either of them, or the said debtors or either of them, shall become or be made or declared bankrupts or bankrupt, and the arrangement hereby made or the property comprised in any such conveyance or assignment shall hereby be in any way prejudiced or affected, then such release and discharge as aforesaid shall not prevent any of the said creditors respectively from coming in under such bankruptcy for the purpose for which they would, but for such release and discharge, have been entitled to come in."

This inspectorship deed was registered under the Bankruptcy Act, 1861. By another deed, dated the 22d of February, 1866, the assets of the *Calcutta* firm were assigned to trustees for the benefit of the creditors of the firm, and such of the creditors [112] as *executed the deed released the Defendant *Douglas* and his separate estate from all demands proveable under the deed. The partnership estates and the private estates of the partners, so far as had been disclosed, had been wound up under the inspectorship deed and in bankruptcy, and the English creditors had been paid a dividend of fourpence in the pound, and there remained a sum in hand sufficient to pay another small dividend. On the 8th of September, 1865, the plaintiffs gave the Defendant *Douglas* the following letter signed by them :

"SIR,— Referring to the deed of arrangement and inspectorship of your firm of *Smith, Douglas, & Company*, we beg to testify to your having conformed thereto and supplied all information required to the present time ; and further, to signify our consent to your engaging in any new business or employment on your own account, so far as may not be inconsistent with your aiding and assisting in getting in and winding up the estate of your late firm."

The Defendant *Douglas*, however, did not inform the inspectors of the settlement or the existence of the property comprised in it, and the plaintiffs wrote the letter of the 8th of September, 1865, in ignorance of its existence.

The Defendant *Douglas* stated by his answer, paragraph 27, that he was at the date of the settlements wholly free from debts or obligations of any kind, except current bills for personal and household expenses of trifling amount, all of which had long since been fully paid and satisfied.

A case was, however, set up by the bill with respect to certain speculations in jute and cotton in which the firm had been engaged previously to his becoming a partner, and in which he was alleged to have been entitled to a share in the profits, and

consequently to liability for losses. The speculations had eventually turned out disastrous, and caused a considerable part of the liabilities of the firms. If that case were established there would be a liability still existing, incurred before the date of the settlement. The Defendant *Douglas*, however, denied that he had incurred any liability with respect to these transactions.

The bulk of the evidence, which was very voluminous, related *to this part of the case, but it was not argued out, and [113 for the purpose of the decision it may be considered that there was no debt now owing from the defendant *Douglas* which had been incurred prior to the date of the settlement now sought to be set aside.

Mr. *Colton*, Q.C., Mr. *Lindley*, Q.C., and Mr. *Fellows*, for the plaintiffs :

It is clearly established by the evidence in this case that at the time the defendant *Douglas* made this settlement he contemplated becoming a partner in the business, and only six weeks after making it he did actually become such. But if there were any doubt as to his intention the frame of the settlement is such that the Court will presume it. An interest terminable on bankruptcy is just what a man would make who had determined to engage in a hazardous business, and the character of this business must have been well known to the defendant *Douglas* from knowledge acquired during his clerkship.

Under these circumstances it is quite unnecessary to go into any question whether there is now any liability which was in existence when the settlement was made. A man contemplating going into trade is not allowed to take the bulk of his property out of the reach of his creditors. The principle upon which the case rests was laid down by Lord *Hardwicke* in *Stileman v. Ashdown* ⁽¹⁾, where he says: "It is not necessary that a man should be actually indebted at the time he enters into a voluntary settlement to make it fraudulent; for if a man does so with a view to his being indebted at a future time it is equally fraudulent, and ought to be set aside." And the same view was followed in *Taylor v. Jones* ⁽²⁾. Where the result fairly to be anticipated follows, the intention to defeat or delay creditors will be presumed, and it is not necessary to show that there are existing creditors whose debts arose before the settlement: *Ware v. Gardner* ⁽³⁾; *Barling v. Bishopp* ⁽⁴⁾. It is quite sufficient that a man is about to enter on a course which may result in liability to bring such a deed within the statute of 13 Eliz. c. 5: *Crossley v. Elworthy* ⁽⁵⁾. In that case one ground

⁽¹⁾ 2 Atk., 477.

⁽²⁾ Law Rep., 7 Eq., 817.

⁽³⁾ Ibid., 600.

⁽⁴⁾ 29 Beav., 417.

⁽⁵⁾ Law Rep., 12 Eq., 158,

114] *of decision was, that a man had no right to make such a settlement at a time when he had liabilities hanging over his head which might result in insolvency. Where indebtedness at the date of the settlement is not made out the Court may still infer fraud from the facts of the case, as here from the terms of the deed: *Townshend v. Windham* ⁽¹⁾. The release by the creditors of the Indian firm has no effect against the creditors of the English firms, and if it be said that the plaintiffs executed that release they did so only as creditors of the Indian firm. If the case as to the jute speculations is gone into it will only be necessary to show that the defendant *Douglas* was under some liabilities in respect to transactions which have since resulted in insolvency.

Mr. *Bristowe*, Q.C., and Mr. *Fischer*, Q.C., for the defendant, *William Douglas*, and the trustees of the settlement :

The settlement cannot properly be objected to on the ground of the possibility that some liability might arise after its execution, the settler being free from liability when it was executed ; for that was the state of circumstances in *In re Kerrison's Trusts* ⁽²⁾. It is a necessary ingredient in the plaintiff's case to show the existence of some liability at the time of the settlement, which has not been discharged. This appears from *Crossley v. Elworthy* ⁽³⁾, which is so much relied on by the plaintiffs. For in the judgment that point is distinctly put forward, and made one of the grounds of the decision. There were in fact two grounds upon which that case rested : the initial indebtedness which continued without intermission, and the occurrence of a liability which, though not anticipated when the settlement was executed, arose out of facts done previously, and was considered to relate back to them. Here not a single debt existing at the date of the settlement has been put into proof since, and, such being the case, the settlement cannot be set aside at the suit of subsequent creditors without proof of actual fraud: *Holmes v. Penney* ⁽⁴⁾; *Skarf v. Soulby* ⁽⁵⁾.

[The VICE-CHANCELLOR: The question is, whether a man who, within two months of going into business, makes a voluntary settlement, *must not be considered to have done so with the intention of delaying his creditors.]

This was a mere expectation, which might or might not be carried out at the date of the settlement, and the contingency of entering into the partnership is too remote to affect its validity. It would be necessary also to establish that the settler contemplated incurring a loss. The statute of *Elizabeth* requires

⁽¹⁾ 2 Ves. Sen. 1.

⁽²⁾ Law Rep., 12 Eq., 158.

⁽³⁾ Law Rep., 12 Eq., 422.

⁽⁴⁾ 3 K. & J. 90.

⁽⁵⁾ 1 Mac. & G., 304.

the intention to defeat creditors to be shown, and even if an actual partnership were supposed to raise an implication of such intention that consideration would not apply here. In fact if the deed is avoided on account of the contemplated partnership, it must be shown that the circumstances are such as would have avoided it if the partnership had not taken effect. The result of the evidence is that it was then improbable that the partnership would take effect.

The rule is that a settlement is good unless one of these cases can be established. Either insolvency must be the necessary result of its execution, as in *Spirett v. Willows* ⁽¹⁾ — a principle which was discussed in *Freeman v. Pope* ⁽²⁾, and was the ground of the decision in *Thompson v. Webster* ⁽³⁾ — or, at least, the settlement must be shown to have been made with a view to the settler becoming actually indebted to the extent of insolvency: *Stileman v. Ashdown* ⁽⁴⁾; or else there must be some “mark of fraud, collusion, or intent to deceive subsequent creditors”: *Townshend v. Wyndham* ⁽⁵⁾, where the distinction between 13 Eliz. c. 5 and 27 Eliz. c. 4 is clearly shown. When the settler is not indebted at the time of the settlement fraud must be expressly shown: *Stephens v. Olive* ⁽⁶⁾; *Kidney v. Coussmaker* ⁽⁷⁾; *Richardson v. Smallwood* ⁽⁸⁾. There was nothing to prevent the defendant *Douglas* from disposing of the property, and if so, there could be no objection to his settling it. *Barling v. Bishopp* ⁽⁹⁾ and *Ware v. Gardner* ⁽¹⁰⁾ are clearly distinguishable from the present case, the object of evading a definite liability likely to arise being manifest.

*Next, the releases in the deed of inspectorship and the [116 Indian trust deed constitute an absolute bar to the suit, the clear intention being to wind up the estates and leave the partners free.

[They also cited *Holloway v. Millard* ⁽¹¹⁾ and *Martyn v. M'Namara* ⁽¹²⁾.]

SIR R. MALINS, V.C.:

This case raises as important a question, proeably, on this branch of the law as has ever been brought before the Court.

The circumstances are very simple. Mr. *Douglas* had been for some years a clerk in various mercantile houses, and in the autumn of 1863 was a clerk to a firm carrying on business in *London*, *Liverpool*, and *Culcutta*, under the names of *William*

⁽¹⁾ 3 D. J. & S., 293.

⁽⁹⁾ 2 Bro. C. C., 90.

⁽²⁾ Law Rep. 9 Eq., 206; Ibid. 5 Ch.,

⁽¹²⁾ 12 Ves., 136.

588.

⁽³⁾ Jac., 552.

⁽⁴⁾ 4 Drew., 628.

⁽⁵⁾ 29 Beav., 417.

⁽⁶⁾ 2 Atk., 477.

⁽¹⁰⁾ Law Rep. 7 Eq., 317

⁽⁷⁾ 2 Ves. Sen., 1.

⁽¹¹⁾ 1 Madd., 414.

⁽¹²⁾ 4 Dr. & W., 411.

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Mackay v. Douglas.

V. C. M.

Grant & Co., James Smith & Co., and Grant, Smith, & Co. His salary, which was for some time £200 a year, had latterly been raised to £500.

In the latter part of the year 1863 his employers were engaged on a very large scale in speculations in jute, which is an article subject to very considerable variations in price. These speculations, which I think were of a reckless and unjustifiable character, were to some extent carried on by the aid of Mr. *Douglas*, and it is not attempted to be denied that he was to some extent interested in the result of them. The plaintiffs say that he was interested jointly as a partner, and certainly there is a passage in Mr. *Smith's* evidence which seems to sustain that view.

But, though I do not intend to rest my conclusion on any such grounds, it is not unimportant to observe that for several months before the settlement in question was made he was certainly, either on his own account or on account of the firm whose servant he was, engaged in these reckless speculations in jute. In this state of things the firm were carrying on business in *London* and *Liverpool*, and in connection with some other persons in *India*. Of the English partners it is only necessary to refer to Mr. *Smith* and Mr. *Grant*. Proposals had been made for the retirement of Mr. *Grant*, and this business was to be carried on by Mr. *Smith* alone, or with such persons as he should think [117] proper to take into partnership *with him. It is perfectly plain, for it is shown under the hand of Mr. *Douglas* himself, that he entertained the expectation of going into partnership with Mr. *Smith* his employer, if Mr. *Grant* retired. That is very distinctly shown in a letter so early as the 11th of September, 1863, written by Mr. *Douglas* to Mr. *James Smith*. It gives the particulars of some purchases of jute and so forth, and then he says:

[His honor then read the passage in the letter above set out, and continued:]

So matters went on, and in October, the very next month, Mr. *Douglas*, who in the course of his clerkship had amassed a sum of money which he says amounted to about £3000 or £4000, but which I cannot make out amounted to so much, entered into this transaction. He was a married man, having at the time no child, but in the progress of this business the first child of the marriage was born, and on the 8th of October, 1863, while it appears that he certainly had it in his mind as a probable event that he would go into partnership with his employer Mr. *Smith*, he entered into a contract to purchase a leasehold house, which is the subject of this suit. The contract was on the 30th of October, and the purchase was completed by an assignment to himself on the 2d of November. All was right so far, and nobody can complain of that part of the transaction. But while

he was carrying on the negotiation for the partnership, on the 19th of January, he saw his solicitor, and talked of making, but did not give him positive instructions to make, a settlement of the leasehold house, which was worth from £1500 to £1800. On the 12th of February, 1864, he gave final instructions to his solicitor to prepare a voluntary settlement of that property, and in pursuance of the instructions the settlement was prepared and duly executed on the 24th of February, 1864.

Now the trusts of that settlement were for Mrs. *Douglas* for her life to her separate use in the usual way, with remainder to himself if he should survive her for life, or until he should become bankrupt or insolvent. Then there were the usual trusts for children, and in default of children, to himself absolutely. On the 8th of April following (forty-four days, I think, is the precise time, but it may be called six weeks afterwards,) he entered into partnership *with Mr. *Smith*. The partnership, [118 in point of profits, was to commence from the 1st of May, that is, Mr. *Grant's* contract was to go out on the 30th of April, and the arrangement between *Smith* and *Douglas* was, that he should succeed on the next day. Accordingly the business begins actively on the 1st of May, 1864, that is, rather more than two months from the time when the voluntary settlement was executed; but it must, for the purpose for which I look at it, be considered as commencing when the articles of partnership were signed.

Mr. *Douglas* went to *India*, and his partner, Mr. *Smith*, remained at home, and whether with the connivance, or approbation, or knowledge of *Douglas*, it seems somewhat uncertain, but it is certain that the business was so conducted that the firm was in difficulties so early as the month of November in the same year. They were borrowing and were embarrassed; the embarrassments so much increased that in the following month of March they failed for the sum of £347,000, and up to this time their dividend has been fourpence in the pound, and I am told that there is a possibility that there may be another penny, so that probably they will not pay sixpence in the pound.

Now to all these proceedings, however innocent Mr. *Douglas* may have been while in *India*, I must regard him as a party, because one party is liable for the misteasance of another. One of the most fruitful sources of ruin to men of the world is the recklessness or want of principle of partners, and it is one of the perils to which every man exposes himself who enters into partnership with another.

Now this question seems to me to raise a most important point. Can a man who contemplates trade, or who, in point of fact, whether he contemplates it at the time or very shortly afterwards,

enters into trade, and thereby incurs liabilities which end in a disastrous state of affairs, make a voluntary settlement which shall be good against the creditors who become so in the course of his trade? I am not aware of any case upon the exact point, and none was cited, although almost all the cases which have occurred upon the subject were mentioned. But is the statute of *Elizabeth* so very short in its effect that it will not cover a case where a man on the very eve of entering into trade takes [119] the bulk of his *property and puts it into a voluntary settlement and becomes insolvent a few months afterwards? Is it to be said that such a settlement cannot be reached by any principle of law? I think not. Lord *Langdale* considered the question very fully in *Townsend v. Westacott* ⁽¹⁾, where the insolvency did not arise until three years after the voluntary settlement was executed; and he there laid down the rule that the burden of proving the position of the parties, and that they were in a position to make a voluntary settlement, was shifted and thrown upon the man who executed the voluntary settlement; and last year I also considered the same subject very fully in *Crossley v. Elworthy* ⁽²⁾ where Mr. *Elworthy*, who possessed a very considerable amount of property, considered himself solvent, made a settlement of a large amount, and was in difficulties nine months afterwards. I thought, following the previous decisions, that in that case the whole burden was thrown upon him of showing that he was not only solvent but in a situation to justify his making a voluntary settlement; I say, in the same way, that Mr. *Douglas*, having become bankrupt or insolvent within seven months after the execution of the settlement, has the burden cast upon him of showing, not merely that he was solvent, but that he was in a situation which justified him in making a voluntary settlement of the great bulk of his property. I carried the principle somewhat further perhaps in *Crossley v. Elworthy* than the previous decisions, because I did not treat it as turning on the mere question of solvency or insolvency, but I said ⁽³⁾, "If a man does under such circumstances" — that is, when it is doubtful whether he is in a solvent condition, and, if so, uncertain whether he is likely to remain so — "make a settlement, it seems to me in the highest degree reasonable that upon him should be thrown the burden of proving that he was in a condition to make it when it was executed." [His Honor then referred shortly to the facts of the present case, and continued:] I am satisfied from the evidence that Mr. *Douglas* contemplated a partnership, and that the probability of such a partnership was the inducement to him to make the settlement. He had very likely never heard of the Statute of *Elizabeth*; but taking a

(1) 2 Beav., 340; 4 Beav., 58. (2) Law Rep., 12 Eq., 158. (3) Law Rep., 12 Eq., 168

common *business like view of the matter, and consider- [120
ing the rather reckless nature of the business into which he was
entering, he wished to make a provision out of the leasehold
house which he had bought for his wife and any children he
might have. I cannot hesitate to come to the conclusion that
the inducement to him to make this settlement on the very eve,
as I consider it, of his going into business was to protect this
property from any risk.

Many cases have been cited. It is not at all necessary to show
that a man had any fraudulent intent in making a settlement as
the law is now settled. It is very true that some of the old au-
thorities cited by Mr. *Fischer*, particularly *Stileman v. Ashdown* ⁽¹⁾,
and many of the decisions long after that, proceeded upon the
assumption that the settlement could not be set aside unless
there was an intention to defraud, because the words of the
statute are, "with intent to defraud, defeat, or delay creditors."
But that has been long got rid of, and it is not necessary now
to show that. The statute speaks of cases where the creditors
"are, shall, or might be in any wise disturbed, hindered, de-
layed, or defrauded," and it is not necessary to show an inten-
tion to do that, because if the settlement must have that effect
the Court presumes the intention and will attribute it to the
settler. That is distinctly laid down by the present Lord Chan-
cellor, on appeal from Vice-Chancellor *James*, in *Freeman v.*
Pope ⁽²⁾. I acted upon that principle in *Crossley v. Elworthy* ⁽³⁾,
where I expressly gave Mr. *Elworthy* the benefit of my opinion,
that he did not intend to commit a fraud, but as the settlement
had the effect of defeating or delaying his creditors I attributed
the fraudulent intention to him within the meaning of the sta-
tute, and set the settlement aside. So I dare say that Mr.
Douglas had no fraudulent intention, according to his view, in
making the settlement, and that he thought it a prudent thing
to protect his wife and children. But in doing that he has,
within the meaning of this statute, committed a fraudulent act,
because, going into trade, he was taking away the only property
which would be available for his creditors.

This happens to be a small amount of property with reference
to the debts incurred, and with reference to the position of Mr.
**Douglas* when the settlement was executed. But if I [121
were now to decide against the plaintiffs my decision would be
applicable to any case. Suppose then the case of a man with a
large fortune, and having a fancy (and I have known such cases)
for going into trade. He says: "I am going into trade; I be-
lieve I may make a great deal of money by it, but nobody knows
what may happen. Therefore, I will make this large fortune

(1) 2 Atk., 477.

(2) Law Rep., 9 Eq., 206; Ibid., 5 Ch., 538.

(3) Law Rep., 12 Eq., 158.

safe by settling it on my wife and children absolutely." The law is perfectly settled that if a man is solvent at the time and after the time of taking away the property which is put into the settlement he remains solvent, and does not at the time contemplate doing anything which could lead to insolvency, that settlement will be good. One of the cases cited, *Holloway v. Millard* ⁽¹⁾, illustrates that proposition. There a woman had £42,000, and she settled £36,000 on her illegitimate child. There remained £6,000 after taking away the £36,000. She was perfectly solvent, and there was no evidence whatever that she contemplated doing anything in the world that would lead to insolvency. But some years afterwards she became insolvent, and she died insolvent, and the settlement was held to be perfectly good. So, in the present case, if Mr. *Douglas* had neither gone into nor contemplated going into trade at the time, but some years afterwards, by a totally new arrangement, made up his mind to do so, I should have had no hesitation in coming to the conclusion that his subsequent insolvency could have had no effect in producing invalidity of the settlement which he had made upon his wife and family.

The only rule I have found laid down on the subject that commends itself to my judgment, as I think it must commend itself to the judgment of all right-thinking men, is laid down in a very few words by Lord *Hardwicke* in *Sileman v. Ashdown* ⁽²⁾. The father there had made a purchase in the name of his son, which was a voluntary settlement, on the principle that if a father buys property in the name of his child it is an advancement to or a settlement on the child. Still the father did acts which were likely to lead to debt, and therefore, on that ground, Lord *Hardwicke* set aside the settlement or provision made by [22] the *purchase of a property in the name of the child. Now, what is the meaning of this passage? "It is not necessary that a man should actually be indebted at the time he enters into a voluntary settlement to make it fraudulent; for if a man does it with a view to his being indebted at a future time it is equally fraudulent." Mr. *Bristowe* pressed upon me that it meant he contemplated getting into debt. But I do not read it so. I read it thus: that if a man does it with a view of being indebted at a future time, that is, with a view to a state of things in which he may become indebted, that makes it fraudulent, just as if he were indebted at the time. In the present case Mr. *Douglas* made the settlement, as I am perfectly satisfied, with the view that he was going into partnership in which he might become bankrupt or insolvent and utterly ruined; and therefore he did it with the view that he might be indebted, and the settlement in my opinion was fraudulent and void against

(1) 1 Madd., 414.

(2) 2 Atk., 477.

creditors. The conclusion which I arrive at proceeds upon the broad ground that a man who contemplates going into trade cannot on the eve of doing so take the bulk of his property out of the reach of those who may become his creditors in his trading operations.

[His Honor then referred to some of the correspondence as showing that it was treated in January, 1864, as almost a settled thing that he was to go into the business, and continued:]

I therefore hold that the settlement of the 24th of February, 1864, was absolutely null and void against the creditors within the meaning of the Statute of *Elizabeth*, and consequently that when Mr. *Douglas* executed the deed by which he vested all his property either at law or in equity in the inspectors or trustees, this property vested in them as being his, just as much as if the settlement of the 24th of February had never been executed.

That therefore brings me to the next point which was so much relied upon, namely, the effect of the release of the 22d of February, 1866. It is said that because Mr. *Douglas*, in common with other partners, gave up some of the surplus assets of the Indian firm to pay the deficiency of the *London and Liverpool* firm, and in consideration of his doing so a release was executed, that had the effect of depriving these plaintiffs of their right to sue in this suit. I am of opinion that it has no such operation. First of all, *for the reasons I have stated, I am of opinion [123 that the effect of the deed is that the trustees on behalf of the creditors say, "You have given up all you have to give. We are satisfied you have stripped yourself of everything, and in consideration of your doing so we release you." Now, if Mr. *Douglas*, instead of giving up his property, had concealed it, I am of opinion that he could not take the benefit of that release, which was procured by his concealment of the facts. Upon that ground alone I should have come to the conclusion that the release for this purpose was inoperative, but upon the other ground, I say that the property was at that time vested in him, and they did not intend to give anything up. They took all the property of which this is part, and therefore the release has not the operation contended for by Mr. *Bristowe* and Mr. *Fischer*.

The result is that there must be a decree setting aside the settlement, and I am sorry to say, that I see no ground whatever upon which I can relieve either Mr. *Douglas* or his trustees from the costs. It is very unusual for trustees to come forward as these have done actively to support such a settlement. They have thought fit to do so. In the case of *Crossly v. Elworthy* ⁽¹⁾ the remarkable thing was that the wife of Mr. *Elworthy* would not appear to defend that settlement. Mr. *Elworthy* himself, I think,

(1) Law Rep., 12 Eq., 158.

did not appear to defend it, but the guardians of the infants appeared to support it, and I therefore made them pay the costs of the suit. So in this case, as the trustees have come forward to uphold the settlement, they with Mr. *Douglas* are liable to the whole costs. The decree will be to set aside the settlement, with costs against all the defendants.

Solicitors : Messrs. *Hillyer, Fenwick, & Stibbard*; Messrs. *Tamplin & Tayler*.

V.-C.M., May 22, 1872.

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*TORRANCE V. BOLTON.

[*Law Reports, 14 Equity Cases, 124.*]

1870 T., 68.

Vendor and Purchaser — Particulars — Description of Property — Conditions of Sale — Costs — Lien for the Deposit on Property sold.

Where property is sold by auction it is the office of the particulars to give an accurate description of the property, and of the conditions to state the terms on which the sale is made.

Therefore, where certain property was put up for sale, and in the particulars which were advertised, was described as being an absolute reversion in a freehold estate, falling into possession on the death of a lady then in her seventieth year; and by the conditions of sale, which were read for the first time at the auction, just previously to the commencement of the biddings, the property was stated to be sold subject to two mortgages, on bill filed by the purchaser at the auction, who stated that he was deaf, and did not understand that by the conditions he was buying only an equity of redemption in the property:

Held, that although his solicitor paid the deposit on his behalf after having read the conditions, he was entitled to a decree for the rescission of the contract and for a return of the deposit with interest, and a declaration of lien:

Held, also, that though in an ordinary case, inasmuch as the plaintiff's carelessness had contributed to the mistake, he would not have been entitled to the costs of the suit, he might have them on account of having, previously to the commencement of the suit, offered, on condition of having the contract rescinded and the deposit returned, to pay the costs of the sale.

The Court looks with disfavor on the practice of not producing the conditions of sale till the actual time of the auction.

THIS was a suit to obtain the rescission of a contract entered into by the plaintiff for the purchase of a reversionary interest in certain freehold property in the county of *Warwick*.

The defendant, being the owner of the property forming the subject matter of the suit, caused an advertisement to be inserted in the *Rugby Advertiser* of the 8th of January, 1870, which was as follows:

“*Clifton-on-Dunsmore,*
Warwickshire.

Preliminary announcement.

Mr. *William Cropper*

Will offer for sale by auction,

On an early day,

The absolute reversion to

“All that valuable freehold estate, situate as above, and con-

tainings *73A. 2R. 19P., or thereabouts, now in the occupa- [125
tion of Mr. *W. Bull*.

"The reversion falls into possession on the death of a lady now in her 70th year.

"For further particulars apply to Mr. *Edmund Harris*, solicitor to the auctioneer *Rugby*."

Subsequently a further advertisement was issued, by or on behalf of the defendant, which was as follows:

"*Clifton-on-Dunsmore, Warwickshire.*

Valuable freehold estate.

Mr. *Wm. Cropper*

"Begs to announce that he is instructed to offer for sale by auction (unless the same is previously disposed of by private contract, of which due notice will be given), on Tuesday, the 8th day of February, 1870, at the *Lawrence Sheriff's Arms Hotel, Rugby*, at 4 o'clock in the afternoon, and subject to the conditions of sale to be there read.

"All that the immediate reversion in fee simple of and in all the valuable farm and lands, containing 75A. 2R. 19P., with suitable farmhouse and buildings thereon, situate and being at *Clifton-on-Dunsmore* aforesaid, as the same is now in the occupation of Mr. *Wm. Bull*, as tenant from year to year.

"The reversion falls into possession on the death of a lady now in her 70th year.

"For further particulars, and to treat for the purchase, apply to Mr. *Edmund Harris*, solicitor, *Rugby*.

"Dated the 14th day of January, 1870."

The plaintiff was a surgeon practising at *Rugby*, and having seen the advertisements, made some further inquiries as to the nature of the property of a Mr. *Hefford*, who was a confidential clerk of Mr. *Harris*, the solicitor mentioned in the particulars, and whom the plaintiff at that time met on different occasions. There was some questions raised as to the exact amount of information given by Mr. *Hefford* to the plaintiff; but it appeared that he had on one occasion mentioned that there was a reserved price of £3000. On the part of the defendant it was attempted to be shown that Mr. *Hefford* was in fact the agent of the plaintiff, and *that the plaintiff must be considered to be af- [126
fected with any knowledge which Mr. *Hefford* had gained from a Mr. *Henderson*, who was another clerk of the defendant's solicitor, and it appeared was conducting the sale. The case of the plaintiff, however, was that Mr. *Hefford* had given him no information from which he could suppose that the property was in any respect other than as described in the particulars.

The auction took place as mentioned in the advertisements,

and before the opening of the biddings by the auctioneer, Mr. *Henderson*, who was present on behalf of the vendor at the sale, read through certain particulars and conditions of sale from a manuscript. No copy of the document read was handed to the intending purchasers.

The document so read, was as follows :

"Particulars and conditions of sale of the absolute reversion of and in a valuable freehold estate at *Clifton-on-Dunsmore*, in the county of *Warwick*, to be offered for sale by auction at the *Lawrence Sheriff's Arms Inn, Rugby*, on Tuesday, the 8th day of February, 1870.

"Particulars.

"All that the immediate absolute reversion in fee simple of and in all that valuable farm and lands, containing 75A. 2R. 19P., with suitable farm house and buildings thereon, situate and being at *Clifton-on-Dunsmore* aforesaid, as the same is now in the occupation of Mr. *William Bull* as tenant from year to year, falling into possession on the death of a lady now in her 70th year."

The conditions of sale followed. By the first of them the vendor reserved the right, by himself or his agent, to bid once for the property. The third condition was of the usual description as to delivering the abstract and making requisitions on the title.

The 4th condition was as follows :

"The estate, the absolute reversion to which is the subject of the present sale, is subject to two several mortgages created by the vendor's predecessors in title : one for securing the principal sum of £1500 and interest at the rate of £4 15s. per centum per annum, and the other for securing the principal sum of £499 [26] and *interest at the rate of £4 10s. per cent.; and the vendor has, by an indenture bearing date the 13th day of July, 1869, charged his reversionary estate with the sum of £500 and interest at £5 per cent. per annum. The purchaser shall take a conveyance subject to the said three several mortgages, and shall pay interest to the mortgagee on the said principal sum of £500 from the said 25th day of March next, all interest on the said sum up to that day being paid by the vendor. The interest on the said respective sums of £1500 and £499 is paid by the person entitled to the rents and profits of the said estate for life. The sale is also made subject to any claim for succession or other duty which may arise on the death of the tenant for life."

The 9th condition gave the vendor the option of reselling and

charging the purchaser with any deficiency in case of his failure to comply with any of the conditions.

The plaintiff was seventy-three years of age and very deaf, and he stated that he did not hear distinctly or pay much attention to what was read, and did not understand that by the 4th condition the property was sold subject to the incumbrances therein mentioned.

The sale was then commenced by the plaintiff making a bid of £2000. A few other bids were made, but the sale was very inactive. Ultimately the property was knocked down to the plaintiff for £2500. He then signed a memorandum attached to a copy of the particulars and conditions of sale, acknowledging that he had purchased by public auction the reversionary estate mentioned in the particulars, and that he had paid the agent of the vendor £250 as a deposit; and he agreed to pay the balance of the purchase-money and complete the purchase in all other respects agreeably to the conditions of sale. He signed this memorandum without reading the particulars or conditions attached.

The deposit was, in fact, not paid till the next day. The plaintiff then sent his solicitor, whom he had not previously consulted in the matter, to the office of the defendant's solicitor, giving him a check for £250, and requesting him to see to the completion of the purchase. The plaintiff's solicitor, on attending in accordance with these instructions, was shown a copy of the particulars and conditions, and he at once stated, on [128 reading the 4th condition, that he believed the plaintiff did not know he was buying subject to the incumbrances. On the 10th of February, 1870, the defendant's solicitor sent the plaintiff's solicitor a copy of the particulars and conditions of sale, and the plaintiff stated that he then for the first time became aware of the effect of the 4th condition. On the 22d of February, 1870, an abstract of the vendor's title was sent to the plaintiff, on which was stated, both on the back and inside, the fact of the reading of the conditions at the sale.

On the 26th of February, 1870, the plaintiff's solicitor wrote to the defendant's solicitor on behalf of the plaintiff as follows :

"Dear Sir,—Having had a long interview with Dr. *Torrance*, who is anxious to be released from this contract in consequence of the misapprehension he was under, both previous to and at the sale, as to any incumbrances being on the property which the purchaser would be liable to pay.

"Previous to the sale Dr. *Torrance* had read only the particulars of sale, which describe the property sold as an absolute reversion, whereas it turns out that it is only an equity of redemption of and in such reversion.

"That Dr. *Torrance* had not read the conditions of sale, and being very deaf he did not hear them read at the sale, and knew nothing of the mortgages mentioned in the fourth condition, but (being misled by the description of the property in the particulars of sale) he supposed he was purchasing the absolute reversion therein mentioned, and bid accordingly for it, and not for a mere equity of redemption subject to mortgages which would double his purchase money. He was also induced to bid up to the amount he did in consequence of a conversation he had had with Mr. *Hefford* previous to the sale, when he informed Dr. *Torrance* that your reserve was three thousand pounds. Under these circumstances Dr. *Torrance* is desirous to have the contract rescinded and his deposit returned, and is willing in such case to pay all the expenses of and incident to the sale."

The plaintiff's solicitor received an answer to this letter from defendant's solicitor, dated the 28th February, 1870, in which [29] *he deprecated the proposal, but promised to refer the matter to the defendant; and on the 2d of March, 1870, he wrote again, positively declining to rescind. On the 4th of March following the plaintiff sent in his requisitions on title, making them expressly without prejudice to his right to rescind; and, on the 17th of March, 1870, his solicitor gave formal notice of rescinding the contract, and threatened proceedings for the return of the deposit. The defendant's solicitor then gave a notice requiring the plaintiff to complete the purchase, threatening that unless this was done he would forfeit the deposit and rescind the contract, and would proceed under the 9th condition. The plaintiff's solicitor, in answer to him, repeated the offer made on the 26th of February; and on the 11th of May, 1870, the defendant's solicitor wrote to the effect that the deposit was forfeited, and that the property would be resold and the plaintiff treated as liable for any loss.

The defendant then advertised the property for resale on the 31st of May, 1870, and the bill was filed on the 30th of May, 1870. The prayer was that the contract might be declared to be rescinded and any action by the defendant restrained, and that the deposit might be returned, and a lien be declared for it upon the property.

A further point set up on behalf of the plaintiff was, that the sale was invalid on account of sham biddings, supposed to have been made by agents of the defendant. It was, in fact, alleged, that the amount bid by the plaintiff, together with the mortgage debt, exceeded the value of the property, and that no one who understood the effect of the 4th condition would make any addition to the plaintiff's first bid. Part of the case set up by the answer was, that it was impossible under the circumstances that

the plaintiff could have misunderstood what took place at the auction, or failed to hear the reading of the conditions.

Mr. Cole, Q.C., and Mr. Rigby, for the plaintiff:

The law is now well settled, that it is the duty of a vendor to ascertain the correctness of the description of property put up for sale by him, and on a sale the description in the particulars is part of the contract, and the vendor cannot throw upon the purchaser the obligation of ascertaining its correctness or discovering mistakes in it. This rule holds good even in the case of sales under *the Court: *Martin v. Colter*⁽¹⁾; *Lashlan* [130 v. *Reynolds* ⁽²⁾]; *White v. Cuddon* ⁽³⁾.

[The VICE-CHANCELLOR: The proper office of the particulars is to describe the subject matter of the contract, that of the conditions to state the terms on which it is sold].

The Court has frequently objected to catching conditions of sale, but the case is much worse where the particulars are calculated to mislead. The rule that a party is bound by a description he chooses to make of property was acted on by Lord Thurlow in *Calverly v. Williams* ⁽⁴⁾, and by Lord St. Leonards in *Mortimer v. Shortall* ⁽⁵⁾. The equity here is to rescind the contract. Rectification can only be decreed where the mistake is mutual: *Harris v. Pepperall* ⁽⁶⁾. If the contract is rescinded the plaintiff is entitled to a lien on the property for the deposit, as well as to a decree for its return: *Rose v. Watson* ⁽⁷⁾.

[They cited *Gilliat v. Gilliat* ⁽⁸⁾ on the question of the alleged irregularity in the biddings.]

Mr. Pearson, Q.C., and Mr. Nugent, for the defendant:

This is a suit asking to have the contract rescinded and the deposit returned. It is a very different case from any of those cited, which were in general suits for specific performance. And it may well be that the Court would not, under the circumstances, decree specific performance of the contract at the suit of the vendor, and yet not be willing to decree a rescission, the contract having been signed, and there being part performance by payment of the deposit, after the plaintiff's solicitor who made the payment was aware of the nature of the conditions. If the Court does not decree a rescission, which is the principal part of the relief prayed, it will not order the return of the deposit, which is merely collateral: *Kendall v. Beckett* ⁽⁹⁾, but will leave the plaintiff to any remedy he may have at law. Here

⁽¹⁾ 3 J. & Lat., 496.

⁽²⁾ Kay, 52.

⁽³⁾ 8 Cl. & F., 766; also 4 Y. & C. Ex., 25 under the name of *Cuddon v. Cartwright*.

⁽⁴⁾ 1 Ves., 210.

⁽⁵⁾ 2 Dr. & W., 363.

⁽⁶⁾ Law Rep., 5 Eq., 1.

⁽⁷⁾ 10 H. L. C., 672.

⁽⁸⁾ Law Rep., 9 Eq., 60.

⁽⁹⁾ 2 Russ. & My., 88.

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Torrance v. Bolton.

V.C.M.

131] the relief principally prayed *must be refused. The only equitable ground for relieving a party from a contract is actual fraud, or a mistake brought about in such a way as amounts almost to fraud, and that kind of case is not attempted to be set up. In *Twining v. Morrice* ⁽¹⁾ the Court dismissed a bill for specific performance, and at the same time dismissed a cross bill for a rescission of the contract, and did so because the alleged fraud was not made out.

[The VICE-CHANCELLOR:—Lord Cairns, in *Aberaman Iron Works v. Wickens* ⁽²⁾, directed the rescission of a contract where there was no question of fraud.]

There must at least be mistake, or misdescription, or concealment maintained at the sale, so that the parties had no chance of discovering the real facts. Such are the cases of *Morshead v. Frederick*, referred to by Lord St. Leonard, vendors and purchasers ⁽³⁾; and *Coote v. Coote* ⁽⁴⁾. In *Stanton v. Tattersall* ⁽⁵⁾ a rescission was allowed on the ground of the misdescription, which could not have been discovered by the purchaser, and not on account of the more patent defect. It is morally impossible that the plaintiff could have failed to understand the facts before bidding.

SIR R. MALINS, V.C., after referring to the facts, continued:

The vendors from the beginning, intended to put up the property under conditions which threw upon the purchaser the obligation of paying off the mortgages to which it was subject, or in other words, they put up for sale, not the property free from incumbrances, but the equity of redemption in it; and the plaintiff swears that he went to the sale intending to bid, and did bid, in the belief that he was to purchase property for the enjoyment of which he would only have to pay the purchase money, and would then, after the expiration of the life estate of the tenant for life, who was then in her seventieth year, have it absolutely free from all incumbrances. Now a mistake on both sides is undoubtedly a ground for relieving a party from a contract into which he has entered.

Mr. Pearson was very anxious to impress upon me that the Court never entertains a suit for the rescission of a contract 132] unless *it has been obtained by fraud. I express my strong impression, derived from many years' experience in cases of vendor and purchaser, that mistake, where it is satisfactorily established, as where a purchaser has been led by the conduct of the vendor to believe that he has been purchasing one thing when in fact he has been purchasing another, is just as good a

⁽¹⁾ 2 Bro. C. C., 326.

⁽²⁾ Law Rep. 4 Ch., 101; *Ibid.* 5 Eq., 485.

⁽³⁾ 14th Ed., p. 120.

⁽⁴⁾ 2 Ir. Eq. Rep., 159.

⁽⁵⁾ 1 Sm. & Giff., 529.

ground for rescuing persons from a contract as fraud. A remarkable instance of this is *Stanton v. Tattersall* ⁽¹⁾, which was a decision of Vice-Chancellor *Stuart*, never appealed from, but always acquiesced in, and accepted as a binding authority by Lord *St. Leonards*. [His honor then referred to the facts of that case and continued :]

That was a case of misdescription, not treated as fraudulent, because the purchaser by a common act of prudence might have found out what he was buying. Nevertheless he was held to be entitled to rely on the description of the property and to relief according to the frame of the suit, as to which, I am bound to admit, there is a great deal of difficulty; inasmuch as it was not a bill for specific performance, but one by a purchaser to be relieved from his contract, that is, a bill to rescind a contract. He was, however, relieved both on the ground of misrepresentation and on the ground that the house, being approached by a wooden passage, did not come within the description of that which he had bought.

But this case raises a point of very general importance, as to the practice, which I am told, prevails in almost all parts of *England*, of advertising the property to be sold under conditions of sale to be produced at the auction. They are not annexed to the particulars, but are read and listened to in the confusion and hubbub of the auction room, by persons of different degrees of understanding, who are in those circumstances intended to be bound by conditions of the most onerous description put forward by persons who have had the fullest opportunities of printing and annexing them to the particulars, but have failed to do so. However, I do not believe the practice to be general. In no case which has been brought before me since I have sat here has such a practice been adopted, and during the last twenty years of my practice at the bar I do not remember more than one such case, and that was from the remote parts of the West of *England*, where I believe such a practice did formerly [133 prevail, but has now ceased. But if the practice does prevail the profession cannot too distinctly understand that it is one to be reprobated in the strongest manner. It is detrimental to the interest of their clients, it is calculated to mislead, and it has, in my opinion, the most prejudicial effect on the interests of all concerned.

Take the present case; what would have been more simple than for these parties, who, I believe, intended to act properly, to describe what they were selling in accurate terms? When a man describes property he is selling as being seventy-five acres of land, that means that he is selling the fee simple. Here the

(1) 1 Sm. & Giff., 529.

description was so far accurate as to state that what was sold was the fee simple, not in possession, but subject to the life estate of a lady in her seventieth year; and if it had gone on to say that it was sold subject to mortgages for £2500, it would have been perfectly accurate; but the vendor has preferred stating this by way of a condition. Then he was bound to let everybody who was likely to bid for this property know exactly what he would have when he bought, and under what conditions he was buying. That was not done.

[His Honor then referred to the evidence as to what took place at the auction, and concluded that the plaintiff did not understand the effect of the conditions. He then continued:]

Now, if the defendant, choosing to adopt the practice—which, in my opinion, is most prejudicial—of having the conditions read for the first time in the auction room, had only taken the precaution to have them printed and handed to all the gentlemen in the room, and the auctioneer had requested them to follow him whilst he read them, and it had been proved that the plaintiff had had them in his hands, this controversy could not have arisen.

But I go further than this, and I say that the introduction of such a term as this is not the proper office of a condition of sale; and if it be introduced as a condition, it is at all events necessary that such a condition should be in the possession of the person who is attracted by the particulars; and the defendant has shown his sense of the propriety of this view by annexing the conditions, to the particulars, for the purpose of putting the property up for sale a second time. But I am clearly of 134] opinion that this was not *the proper office of a condition of sale. Where property is intended to be sold free from incumbrances it is not necessary to say anything about them, because if there are any they will be paid off out of the purchase money. But where the purchaser is to take upon himself the obligation of paying them off what is sold is in fact an equity of redemption; and the vendor in such a case is, in my opinion, bound to state in the particulars that which will show to a purchaser that he is buying property subject to a mortgage, and is only to have the value of it after satisfying the mortgage. Here nothing could have been more simple than to have explained the facts on the particulars, and enabled parties to make their calculations as to what was to be considered the value of the incumbrances previously, instead of in the hurry and bustle of the auction room; and I think that the defendant has wholly failed in his duty in not stating, in the particulars, that what was sold was merely an equity of redemption.

That being my opinion, I think that the defendant is not pro-

tected at all by the condition, though he would have been protected if it could have been distinctly brought home to the plaintiff that he knew the property was subject to the mortgage, and that he was to pay it off. Accordingly the defendant has attempted to show this.

[His Honor then discussed the evidence on this point and expressed himself satisfied that the plaintiff never intended to give £2,000 for the equity of redemption, and that the defendant never intended to sell the fee simple for that sum. He then continued:]

It is therefore, in my opinion, a case of common mistake. The clear doctrine of the Court is, that where contracts are entered into by mistake they must be rescinded. That is shown by the passage in Lord *St. Leonards* on vendors and purchasers ⁽¹⁾ where *Stanton v. Tattersall* ⁽²⁾ is referred to, and the rule is laid down that mistake is a ground for rescinding a contract in this Court, just as much as fraud. And the mistake being one into which the plaintiff has been led by the grossly negligent and improper mode in which the defendant has [135 conducted the sale, though I am satisfied there was no intention to mislead, the consequence is that the contract must be rescinded.

[His Honor then commented on the correspondence, and stated that he was of opinion that the defendant ought to have accepted the offer contained in the letter of the 26th of February, 1870. He then considered the evidence as to value, and concluded that the property was not worth the £2,500 in addition to the amount of the mortgaged debt. He then continued:]

On the whole, therefore, I come to the conclusion that it was the duty of the defendant, in the description of the property itself, and not merely by conditions of sale, to describe that it was an equity of redemption which he was selling. I think it was an improper thing to introduce the fact of the property being mortgaged by way of condition at all; but if the vendor did it in that way it was incumbent upon him to annex the conditions to the particulars. It has not been attempted to be denied that the defendant must have failed if he had been plaintiff in a suit for specific performance, and considering that the plaintiff was led to give more than the value of the property, I think it is my duty to give him the decree which he asks.

Then comes the question as to costs. If it had not been for the correspondence I should have held that the carelessness of the plaintiff in not attending to the reading of the conditions of sale and want of due caution in not making inquiry would have been a ground for giving him the relief to which he is entitled

(1) 14th Ed. p. 120.

(2) 1 Sm. & Giff., 529.

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without costs. But considering the offer which was made by the plaintiff, the refusal to accept which led to the litigation, I must consider the defendant as the cause of the suit, and give relief with costs.

With regard to the return of the deposit I understand it to be clearly established now as the rule of the Court that where a contract has been rescinded on the ground of fraud, surprise, misrepresentation, or anything of the kind, and where a deposit has been made, it is within the jurisdiction of this Court in the decree that is made also to order the deposit to be returned. Therefore it will be part of my decree that the deposit also shall be returned. I do not know whether you ask for interest, Mr. Cole?

136] *Mr. Cole: It was given in *Webb v. Kirby* ⁽¹⁾, where the deposit was returned.

A short discussion ensued in which the form of the decree in *Aberaman Iron Works v. Wickens* ⁽²⁾ was referred to, and the Vice-Chancellor ultimately directed a decree to be made that the contract should be rescinded and given up to be cancelled, and for a return of the deposit with interest, and a declaration that there was a lien for it on the property.³

Solicitors: Messrs. Cole, Cole & Jackson; Messrs. Iliffe, Russell & Iliffe.

⁽¹⁾ 7 D. M. & G., 376.

⁽²⁾ Law Rep., 4 Ch., 101; *Ibid.*, 5 Eq., 485.

⁽³⁾ This case was affirmed by the Chancellor, Nov. 20, 1872. L.J. Rep. (N.S.) Chanc., 177.

V.-C. B. March 15, 16, 1872.

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*HICKS v. ROSS.

[Law Reports, 14 Equity Cases, 141.]

1869 H. 43.

Will—Annuities—Whether for Life or Perpetual.

Testator devised and bequeathed all his property "of every description," to trustees "for the following uses, intents, and purposes, viz." he left "the sum of £56 per annum to be paid quarterly to his wife," *H. R.* He gave to *A. L.* "the sum of £50 during her life." He left £800 per annum out of the proceeds of an East Indian estate, to be appropriated by his trustees to the maintenance and education of the eight children of his daughter, *I. H.*, wife of Captain *H.*, provided the children should take his name, "under forfeiture of" the £800 per annum, should they decline to do so. If there should be an increased profit to £800 per annum, testator bequeathed the same as therein mentioned. If any of the children should die, their mother should have "the benefit of the deceased child or children's share or shares." The trustees should have the power, should any one of the children get into debt, to forfeit his share, and divide it with the other children. The trustees should have power to sell the East Indian estate, should the profits of the working not be sufficient to pay the annuities to the children; the proceeds of the sale to be invested in certain bonds, "in the names of the said trustees for the benefit of" the children. Should the profits not reach £800 annually from the working or sale of the estate, then the trustees should "charge the residue of" the testator's property to make up the said annual sum of £800. Should the sale realize more than enough, when invested, to pay the sums, the

extra proceeds should be invested in the aforesaid bonds for the benefit of *I. H.*, but the sum to be paid to her from the said investment should not exceed £500 annually :

Held, that the annuity to the testator's widow was for life only ; but that the annuities to the children of *I. H.* were perpetual.

FURTHER CONSIDERATION. *Thomas Ross*, who died on the 30th of August, 1868, made a will, dated the 25th of August preceding, in the following terms :

"I, *Thomas Ross*, of *Kilravock House*, *South Norwood Hill*, *Surrey*, do hereby give, devise, and bequeath, to my trustees now named, viz., *Christian Jacob Ross*, of *Kilravock House*, *South Norwood Hill*, *Surrey* ; *James Theobald*, of 16, *Furnival's Inn* ; *Alexander Neish*, of 150, *Leadenhall Street*, secretary to the *Borokai Tea Company, Limited*, all my property of every description, whether freehold, leasehold, or any other description whatever, for the following uses, and intents, and purposes : viz., I leave the sum *of £56 per annum, to be paid quarterly, to my [142 wife *Harriet Ross*. I leave and bequeath to *Ann Lloyd*, late of *Kilravock House*, the sum of £50 per annum during her life, in addition to the sum of £70 per annum already settled upon her by bond or deed during her life. . . . To my three dogs I bequeath the sum of £20 per annum during their lives, the said sum to be reduced as they drop off. And I also bequeath the sum of £30 each per annum to each of my trustees during their trusteeship, but if any question should arise as to any undue influence my brother *Christian Jacob Ross* has or may have exercised, then I appoint *Thomas Southcott*, of 9, *Hole Street*, *Islington*, to be trustee in his place. I also leave the sum of £800 per annum, out of the proceeds of the profit of the working of my East Indian estate, to be appropriated by my trustees to the maintenance and education of the eight children now alive of *Mrs. Isabella Hicks*, wife of *Captain Hicks*, of the *Scots Greys*, stationed at *Dundalk*, provided the said children shall exchange the name of *Hicks* for that of *Ross*, under forfeiture of the said £800 per annum should they decline to do so. If there shall be an increased profit to £800 per annum, one half part of such increased profit shall be given to my daughter *Isabella Hicks*, and the other half to my said brother *Christian Jacob Ross*, and the said sums of £800 and the increased profit shall be paid to my said daughter *Isabella Hicks*, to her receipt only, and free from the control of any other person or persons whatever. If any of the said children shall die, their mother shall have the benefit of the deceased child or children's share or shares. The trustees shall have the power, should any one of the said children get into debt, to forfeit their share or shares, and divide it with the other children. The trustees shall have the power to sell the said East Indian estate, should the profits of the working not

be sufficient to pay the annuities to the children of Mrs. *Hicks*. The proceeds of the sale of the said estate shall be invested in *Victoria Bonds* or shares, in the names of the said trustees for the benefit of the said children. Should the profits not reach £800 annually from the working of the estate or the sale of the estate, then the trustees shall charge the residue of my property to make up the said annual sum of £800. Should the sale of the estate realise more than enough, when invested, to pay the [143] said annuities, then the *extra proceeds shall be invested in the aforesaid bonds for the benefit of Mrs. *Isabella Hicks* ; but the sum to be paid her from the said investment shall not exceed £500 annually, which is to continue for her sole use and benefit. For the working of the *East Indian* estate, I leave (in addition to the sums already forwarded to *India* for the working of the said estate) it to my trustees to set aside a sum of money which shall be used as a reserve fund, in case of blight, drought, or any similar cause ; but such sum of money to be equal to only three months' working estate expenses ; such sum of money not to be raised by mortgaging the property or the proceeds to be derived therefrom. The trustees shall be invested with power to invest the moneys for Mrs. *Hicks* and her children in *India* bonds or shares. I appoint my brother, *Christian Jacob Ross*, residuary legatee ; but that the revenue from my various properties shall be appropriated to the payment of all debts due and demands due at my death. I appoint as my executors *Christian Jacob Ross*, *James Theobald*, and *Alexander Neish*. Should the said *Alexander Neish* decline to become a trustee and executor, then I appoint *Thomas Southcott*. This is my last will and testament.

By the codicil dated the same 25th of August, he empowered his trustees to let the estate for a term not exceeding three years ; and by a second codicil, dated the 27th of August, he appointed *Thomas Southcott*, a fourth executor and trustee.

The estate was ample ; but the *East Indian* estate (which had been sold and had realized about £3500) was insufficient to yield £800 a year.

The bill was filed by Mrs. *Hicks*'s children, who were infants, against the executors and trustees, and (by revivor) against the representatives of *Christian Jacob Ross*, who had since died, for administration, and the only important question was, whether the annuities to the widow and to the children of Mrs. *Hicks* were for life only or perpetual.

Mr. *Amphlett*, Q.C., and Mr. *Bush*, for the plaintiffs :

An annuity to a person named will generally be an annuity for life only ; but where the gift is a gift of such an amount of property as will be sufficient to produce an annuity the Court

will infer an *intention that it should be perpetual. Here [144 the property given is the proceeds of the Indian estate. The proceeds are appropriated for the purpose.

Here there is also a gift over on the death of a child. Suppose a child should die; for how long is the mother to have the benefit of the deceased child's share?" Unless the annuity is perpetual, the limitation over and the use of the word "share" are insensible.

The authorities are *Stokes v. Heron* (1); *Mansergh v. Campbell* (2); *Vaughan Hawkins on Wills* (3); *Bent v. Cullen* (4).

Where a life annuity only is intended, as (according to our view) in the case of the widow, the language is different and distinct.

Mr. Eddis, Q.C., and Mr. Nulder, for Mrs. Hicks:

Upon the question of the annuities we support the plaintiffs' contention.

During the minorities of the children, the £800, or a proportional part of it, is payable to Mrs. Hicks: *Crockett v. Crockett* (5); *Hammond v. Neame* (6).

Mr. Swanston, Q.C., and Mr. Housley, for the executors and trustees, and for the widow:

The annuity to the widow is also perpetual, being charged on the testator's property "of every description," including his real estate: *Kerr v. Middlesex Hospital* (7); *Hill v. Ratley* (8).

The life annuity to Ann Lloyd and the provision for the dogs are clearly enough expressed.

Mr. Kay, Q.C., and Mr. Terrell, for the representatives of Christian Jacob Ross:

The annuities are for life only. Both propositions—first, that a gift of an annuity beyond the life of the first taker is of itself a sufficient indication of the intention that it should be perpetual; and, secondly, that an appropriation of property to meet the *annuity is a sufficient indication—are untenable. [145
Lett v. Randall (9); *Yates v. Maddan* (10); *Blewitt v. Roberts* (11).

The principle of *Bent v. Cullen* (12) is that a gift of part of the income of a fund is a gift of so much of the fund as will produce that income. But a gift of so much a year, charged on a particular fund, is not a gift of the fund itself. The testator here has merely said that which the law would have said for him.

The gift of an annuity without words of limitation is a mere

(1) 12 Cl. & F., 161.

(2) 3 De G. & J., 232.

(3) Page 128.

(4) Law Rep., 6 Ch., 235, 238.

(5) 2 Ph., 553, 558.

(6) 1 Sw., 35.

(7) 2 D. M. & G., 576.

(8) 2 J. & H., 634, 644.

(9) 2 D. F. & J., 388.

(10) 3 Mac. & G., 532.

(11) 10 Sim., 491; Cr. & Ph., 274.

(12) Law Rep., 6 Ch., 235.

gift for life. The omission of words of limitation will not enlarge the gift.

The gift over on the death of a child is limited to the lifetime of the mother. The intention was that this provision for the children and their mother should go on during their joint lives; if a child should die, the mother was not to lose the benefit; but that after the mother's death the shares of children already dead or dying thereafter should fall into the residue. Why should not the word "share" apply to a share of income?

The indication of intention is at least as strong in favor of the residuary legatee as of these children.

SIR JAMES BACON, V.C. :

The questions on which the decision of the Court is asked in this case are questions of construction, as to which it is the duty of the Court not to violate any established rule provided that the indications of intention are not so apparent as to control its application.

In this instance the intention of the testator is not very apparent and his will, which was written by a layman, must be considered as a whole.

First, as to the annual sum directed to be paid to his wife, it has been said that, where he wishes to give a life annuity, as to the legatee *Ann Lloyd*, and in the provision made for his dogs, he uses language about which there can be no doubt. That is so; but the remark is not wholly conclusive, if the will be read as an entirety.

The testator begins by a devise and bequest to his executors and trustees of all his property of every description, "for the 146] following *uses, intents, and purposes." That bequest does not, in my opinion, alter the construction in any way. It is simply an expression of that which is the necessary consequence of almost every testamentary disposition which is not specific or demonstrative.

Then he gives to his wife "the sum of £56 per annum, to be paid quarterly," which I think is an annuity to the wife for her life only.

A greater difficulty arises on the gift to the children of Mrs. *Hicks*. The testator has clearly placed himself towards these children *in loco parentis*. He is providing for his grandchildren, and he desires that they shall take his name, which is a very significant fact. Having an estate in *India*, which he estimates will produce £800 a year, he directs his trustees to appropriate that sum to the maintenance and education of these children. [His Honor read the clause to the end of the provision as to the increased profit of the estate, and continued :]

If the bequest had stopped there, the result might have been

to show an intention to benefit the children during their lives only. But the testator goes on to say:

"If any of the said children shall die, their mother shall have the benefit of the deceased child or children's share or shares. The trustees shall have the power, should any one of the said children get into debt, to forfeit their share or shares and divide it with the other children." He then gives the trustees power to sell the estate, "should the profits of the working not be sufficient to pay the annuities to the children;" the proceeds of the sale to be invested in *Victoria* bonds "in the name of the trustees, for the benefit of the said children." Then the testator, who seems to have anticipated a great many events which have actually happened, says: "Should the profits not reach £800 annually from the working of the estate, or the sale of the estate, then the trustees shall charge the residue of my property to make up the said annual sum of £800." If the result of the sale should be less than enough, the trustees were at once to make up the difference; if the result should be more than enough, the extra proceeds, up to £500 a year, were to be invested for the benefit of Mrs. *Hicks*.

As to the general meaning of the testator, therefore, there can be no doubt. Having taken upon himself to provide for his eight grandchildren, he has done so in terms which make his [147] Indian estate liable to make up this £800 a year, and if that fails, then his whole estate is liable to make up the amount. It is an absolute gift, unlimited in time and in terms. The whole of the testator's estate is liable for so much money as will give to each child a fund capable of producing £100 a year. The estate is pointed out as the fund out of which this amount is to be satisfied. I cannot think, upon the whole of these clauses, that the testator meant less than an out and out gift. The gift of residue to the brother amounts to no more than this, that the testator desires that all which shall remain, after his wishes have been accomplished, shall go to his brother.

I am of opinion that, as to the wife, the annuity is for life only; but that as to the children of Mrs. *Hicks*, each of them is to take such an amount as will yield £100 a year.

As to the claim made on behalf of Mrs. *Hicks*, I think the point raised in *Crockett v. Crockett* ⁽¹⁾ does not arise here. There the gift was for the benefit of the wife and children *pari passu*, and Lord *Cottenham* thought the money ought to be paid to her. Here the direction is that the £800 a year is to be "appropriated by" the trustees. The fund must therefore be applied by the trustees, and not paid to Mrs. *Hicks*.

Solicitors: Mr. *Theobald*; Messrs. *Fladgate, Clarke, Smith, & Forster*.

(1) 2 Ph., 558, 558.

V.-C. W. April 16, 24, 1872.

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*BURT V. HELLYAR.

[Law Reports, 14 Equity Cases, 160.]

1870 B., 146.

Will—Construction—Tenancy for Life—Gift of Residue in Fee—"Surviving Children or their Families"—Children or Descendants—Partition Suit—Jurisdiction—Form of Decree.

Testator, who died in 1854, gave all his property to his wife for life, and after giving certain pecuniary legacies and annuities, devised and bequeathed to his son C. all the residue, after his mother's decease, and to his heirs, and in case C. should die leaving no issue, then his freehold estate was to be equally divided between his (testator's) surviving children or their families. All the children of the testator survived their mother, who died in 1861, and, excepting one, all (two without issue, two leaving children, one leaving a child, and the issue of another child) died in the lifetime of C., who died in 1869 a bachelor and intestate:

Held, that this was, like that in *King v. Cleaveland* (¹), a gift on the death of C. without leaving issue living at his death to the other children of the testator then living, and to the families of such of them as were dead:

Held, also, that "families" meant children, and not descendants of the testator's children.

In a suit for partition a question of law arose; but the Court, no one objecting, exercised jurisdiction, but ordered the decree to be prefaced with a statement of the desire of all parties, other than that of an infant, that the case should be decided in this Court.

THOMAS HELLYAR, who died on the 27th of September, 1854, by his will of that date, after directing that his debts, funeral expenses, and certain costs should be paid by his wife, to whom he gave all his property for life, whether freehold, leasehold lands, tenements, hereditaments, goods, chattels, credits, or effects, and after giving certain annuities (since determined) and pecuniary legacies, proceeded as follows: "All the rest, residue, and remainder of my estate and effects, . . . whatsoever and wheresoever situate, of which I may die seised or possessed, . . . I give, devise, and bequeath to my son *Charles* after his mother's decease, and to his heirs; in case he should die leaving no issue, then my freehold estate shall be equally divided between my surviving children or their families." He appointed his son *Charles* sole executor of his will.

161] *The testator's widow died in December, 1861.

Charles Hellyar proved the will, and died in July, 1869, a bachelor and intestate.

The testator left seven children, six sons, *William*, *Charles*, *Francis*, *John*, *Samuel*, and *Richard*, and one daughter, *Mary Ann*.

Francis died in the lifetime of *Charles*, leaving seven children.

John died in October, 1863, leaving a grandson and a daughter.

Samuel died in March, 1864, leaving three children.

Richard died in 1867 a bachelor and intestate.

(¹) 4 De G. & J., 477.

Mary Ann died in July, 1868, a widow, intestate as to real estate, and without issue.

William (a defendant), the eldest brother of *Charles*, had been in possession of the estate under an arrangement with the other persons alleged to be interested therein to account for the rent upon the footing of the plaintiffs—some of the children and grandchildren of *Francis*—and himself and others, defendants, being tenants in common; but he had recently claimed to be sole owner under the will. The plaintiffs prayed for a partition; that their shares might be ascertained and declared, with liberty, if necessary, to charge a sum or sums in gross for equality of partition; and that the respective shares allotted on partition might be held and enjoyed in severalty, or, if the Court should think fit, that the property might be ordered to be sold, and that the proceeds might be distributed amongst the persons interested therein.

Mr. *Greene*, Q.C., and Mr. *Langworthy*, for the plaintiffs:

The questions raised are confined to the freehold estate. It is submitted, first, that the word “families” means children of the testator’s children; next, that the shares of the testator’s children, who died in the lifetime of *Charles*, and which they would have taken if they had been living at the death of *Charles*, go to their children by substitution; and lastly, that the period of distribution was the death of *Charles*.

Where there are words of division as in this case, the primary meaning of the word “families,” viz., children, obtains: *Barnes v. Patch* ⁽¹⁾; *In re Terry’s Will* ⁽²⁾; *Price v. Lockley* ⁽³⁾.

*Substitution was intended by the testator in case any [162 of his own children should die before *Charles*: *King v. Cleaveland* ⁽⁴⁾; *In re Philips’ Will* ⁽⁵⁾. The gift being to all his children who should survive *Charles*, or to the families of such children who predeceased *Charles*, the plaintiffs and the defendant *Henry Hellyar*, who together represent one of the testator’s children, will be entitled to one-fourth of the estate. There is nothing in the will which gives a vested interest to the testator’s children who predeceased *Charles*. The period at which the class is to be ascertained is the death of *Charles*: *In re Gregson’s Estate* ⁽⁶⁾.

It is submitted that the property is divisible in fourths between the testator’s son *William*, the plaintiffs and the defendant *Henry*, the daughter of the testator’s son *John*, and the children of his son *Samuel*.

Mr. *R. W. E. Forster*, for some of the defendants, adopted

⁽¹⁾ 8 Ves., 604.

⁽²⁾ 19 Beav., 580.

⁽³⁾ 6 Beav., 180.

⁽⁴⁾ 26 Beav., 26; 4 De G. & J., 477.

⁽⁵⁾ Law Rep., 7 Eq., 151.

⁽⁶⁾ 2 D. J. & S., 423.

the argument submitted on behalf of the plaintiffs, and for other defendants contended that the word "families," applied as in this case to real estate, means "heirs": *Wright v. Atkyns* ⁽¹⁾; *Roper on Legacies* ⁽²⁾; that the same word applied to personal estate meant next of kin: *Woods v. Woods* ⁽³⁾; and that in this case surviving children meant those only who survived *Charles*.

Mr. *Lindley*, Q.C., and Mr. *Bevir*, for the defendant *William Hellyar*, the only surviving child and the heir-at-law of the testator:

One question is, whether the death of the testator, of the widow, or of *Charles* is the period of distribution? Assuming that the death of *Charles* is the true construction, it is submitted that the defendant *William* takes the whole of the estate; for "or" refers to the prior event — the deaths of all the children before *Charles*; but as *William* alone survived *Charles*, he takes the whole.

If such a construction be not adopted, then it is submitted that "families" here means "heirs": *Counden v. Clerke* ⁽⁴⁾; *White v. 163* ⁽⁵⁾; **Briggs* ⁽⁶⁾; *Jarman on Wills* ⁽⁷⁾; *Hawkins on Wills* ⁽⁸⁾. The clause ought to be read as if it were "surviving children or their heirs," and "or" ought to be construed as if it were "and": *Horridge v. Ferguson* ⁽⁹⁾; *Eccard v. Brooke* ⁽¹⁰⁾; *Harris v. Davis* ⁽¹¹⁾; *Jarman on Wills* ⁽¹²⁾. *Barnes v. Patch* ⁽¹³⁾ is distinguishable from this case, as there the fund was a mixed one. The shares of those children of the testator who died without issue belong to their heir-at-law, *William*.

It is submitted, however, that the death of *Charles* is not the proper time for distribution, but that of the testator or that of his widow; it is immaterial which, for *William* takes as from the death of his mother, and he will be entitled, on the construction that the families of children are entitled, to four-sevenths: *Shailer v. Groves* ⁽¹⁴⁾; *Armstrong v. Stockham* ⁽¹⁵⁾; *Jarman on Wills* ⁽¹⁶⁾. It may be added that *William* desires a partition and not a sale.

[They also cited *Wright v. Wright* ⁽¹⁷⁾; *Lachlan v. Reynolds* ⁽¹⁸⁾; *Hamilton v. Mills* ⁽¹⁹⁾; *Lucas v. Goldsmid* ⁽²⁰⁾.]

Mr. *Greene*, in reply:

In *Wright v. Atkyns* the words on which the question arose

⁽¹⁾ 17 Ves., 255.

⁽²⁾ 4th Ed., 139.

⁽³⁾ 1 My. & Cr., 401.

⁽⁴⁾ Hob., 29.

⁽⁵⁾ 2 Ph., 583, 587.

⁽⁶⁾ 3d Ed. vol. ii. pp. 82, 84.

⁽⁷⁾ Page 80.

⁽⁸⁾ Jac., 583.

⁽⁹⁾ 2 Cox, 218.

⁽¹⁰⁾ 1 Coll., 416.

⁽¹¹⁾ 8d Ed. vol. i. 481.

⁽¹²⁾ 8 Ves., 604.

⁽¹³⁾ 6 Hare, 162.

⁽¹⁴⁾ 7 Jur., 230.

⁽¹⁵⁾ 8d Ed. vol. ii. 183-691.

⁽¹⁶⁾ 1 Ves. Sen., 409.

⁽¹⁷⁾ 9 Hare, 796.

⁽¹⁸⁾ 29 Beav., 193.

⁽¹⁹⁾ Ibid., 657.

were "to my family." There the course of devolution was pointed out, and the devisor's heir was considered as *persona designata*. "Families" here is not a word of limitation; and, consequently, nothing goes to the heir-at-law beyond the one fourth given to him by the will.

SIR JOHN WICKENS, V.C.:

The question in this case arises under the will of *Thomas Hellyar*, dated the 27th of September, 1854.

[After stating the facts, His Honour continued:] It seems to me that this gift must be construed like that in *King v. Cleaveland* ⁽¹⁾, *as a gift, on the death of *Charles* without [164 leaving issue at his death, to the other children of the testator then living, and the "families" of such of them as should be then dead. That this construction involves a grammatical inaccuracy is obvious; but it gives effect to the probable intention, and has strong authority in its favor. If *King v. Cleaveland* ⁽¹⁾ applies to this case, the only question is as to the meaning of the word "family." This is a popular and not a technical expression, and may mean several different things, as was pointed out by Lord *Langdale* in *Blackwell v. Bull* ⁽²⁾, and by Vice-Chancellor *Kindersley* in *Green v. Marsden* ⁽³⁾. But the nature of the gift in the present case excludes many of the possible constructions. It is almost impossible, I think, to construe it here as including any one but blood relations in the descending line; that is, as meaning anything but descendants, or some class of descendants. The words of division import a separation between the families, which excludes any such construction as that of heirs general or blood relations generally. There seem to me to be three different ways in which a gift of real estate to a family may be construed without going beyond the relations in the descending line of the person whose family is mentioned, namely, heirs of the body; children; and descendants of all degrees. The first of these constructions might possibly be considered as the preferable one if the testator's presumable object had been to keep an estate together in a particular line. But it is certainly an unnatural construction of the word "family," as here used; and I do not think that either *Wright v. Atkins* ⁽⁴⁾, or any other decided case, makes it necessary to adopt it. The question is, therefore, one between "children" and "descendants." The former construction is supported by Sir *William Grant's dictum* in *Barnes v. Patch* ⁽⁵⁾, and by *Gregory v. Smith* ⁽⁶⁾, *In re Terry's Will* ⁽⁷⁾, *In re Parkinson's Trusts* ⁽⁸⁾,

(1) 4 De G. & J., 477.

(2) 1 Keen, 176, 181.

(3) 1 Drew, 646, 651.

(4) 17 Ves., 255; Coop. G., 111.

(5) 8 Ves., 604.

(6) 9 Hare, 708.

(7) 19 Beav., 580.

(8) 1 Sim. (N.S.) 242.

and many other cases. It is, also, I conceive, in accordance with common usage. If the testator had spoken in ordinary conversation about one of his sons having a family, or had mentioned 165] the family of one of them, he would in nearly *every case have meant that son's children. No doubt the cases which I have referred to, except *Barnes v. Patch* ⁽¹⁾ (which is the case of a mixed fund), are cases of personal estate. This distinction seems immaterial where the question is only whether the word "family" shall include a larger or smaller class of descendants. The remark that the testator had used the word "issue" correctly in the very sentence in which the word "family" occurs is a very trifling circumstance, but tends more or less to the same result.

On the other hand, in *Williams v. Williams* ⁽²⁾ "family" was construed as descendants. And Mr. *Jarman* appears to have considered that in general the larger meaning would prevail in case of contest. No doubt in many wills it would be the probable and convenient meaning, as in many other wills the probable intention would include all blood relations. In the present will the convenient, and therefore probable, meaning seems to me to be children. According to *Lanphier v. Buck* ⁽³⁾, the persons who would take here under the word "family" are not required to survive the death of *Charles* without issue, or even to survive the brothers or sister of *Charles*, from whom they descend. Therefore in either construction every child of every brother or sister of *Charles* living at the testator's death, or born after it, would take an interest; though as each family would take in joint tenancy as between themselves, this interest, in the absence of severance, might cease by death. And if the larger construction is adopted each descendant coming into existence during the particular estate would take with its parent if alive. This seems to me an improbable intention, as Lord *Cranworth* thought in *Williams v. Williams*. I am quite sure that the testator in this case would not have desired that his great grandchildren (of whom he seems to have had none at the date of his will), the offspring of living parents, should, as soon as born, become equally entitled with their parents. Possibly if he had had full knowledge, and had given the matter full consideration, he might have desired to provide for a great grandchild, the son of a deceased parent who had lost his share by death. But he would hardly have done so by making the share of one of his 166] children go among that child's descendants *of all generations who might come into existence during *Charles's* life. Probably he had no idea of looking beyond the generation of his own grandchildren (the remotest generation then existing)

(*) 8 Ves., 604.

(1) 1 Sim. (N.S.), 358.

(2) 2 Dr. & Sm. 484.

for any purpose whatever. I hold, then, that the gift in the events which happened passed one undivided fourth to *William*, one to the six plaintiffs and their brother *Henry Hellyar*, as joint tenants, one to the surviving daughter of *John*, and one to the three children of *Samuel*, who also take as joint tenants.

This assumes that no severance of any sort took place in *Charles's* lifetime. The will and the evidence in support of it raise questions distinct from that of construction, but I think that they were not pressed at the hearing, so that the decree will be one for partition merely.

I may observe that the question which I have decided is one of law and not of equity, and that a partition suit being an exercise by the Court of administrative rather than contentious jurisdiction, it might not have been right that I should have dealt with it if any one objected. But no one did object, in fact; and I think that, under the circumstances, I do not go beyond the limits of my proper jurisdiction, and that I do what is best for the parties, by now deciding the case. It will be proper, however, to preface the decree with a statement of the desire of all parties, other than the infant, that the questions should be decided here and now.

Solicitors : Messrs. *Emmets, Watson, & Emmet*, agents for Mr. *H. F. Whitefield, St. Columb, Cornwall*; Messrs. *Coode, Kingdon, & Cotton*, agents for Mr. *George Brown Collins, St. Columb, Cornwall*.

To maintain partition the plaintiff must have an actual or constructive possession in common with the defendants. An actual adverse possession is a bar to the action. *Florence v. Hopkins*, 46 N. Y., 182, 2 Barb. Ch., 398; 9 Cow. 580, 5 Denio, 885.

Except the adverse claim is on equitable grounds. *Hosford v. Merwin*, 5 Barb., 52. *Cox v. Smith*, 4 Johns. Ch., 271.

If the premises are unoccupied, one

tenant in common may maintain the action. *Beebe v. Guffin*, 14 N. Y. R., 235.

If one co-tenant grant the land as sole owner, this amounts to an ouster of his co-tenants, and may be the foundation of an adverse possession. *Long v. Stapp*, 49 Missouri, 506.

The remedy is by ejectment for possession, and after recovery therein to file a bill for partition. *Logan v. Goodall*, 42 Geo., 96; see *Moak's Van Santvoord's Pl.*, 236.

M.R. March 18, 19; April 17; May 4, 1872.

*CORNISH v. CLARK.

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[Law Reports 14 Equity cases 184.]

1869 C. 263.

Voluntary Settlement — Pecuniary Gifts — 18 Eliz. c. 5 — Creditor's Suit — Consideration.

A distribution by a debtor, when in a weak state of mind and body, of the whole of his property among his children, partly in consideration of annuities for his life, partly by voluntary settlement, and partly by pecuniary gifts:

Held void as against creditors under the 18 Eliz. c. 5, the Court being satisfied on the evidence that the children were aware at the time that the creditor's

claims would be defeated, though it did not appear that the debtor had any such intention.

This suit was instituted by the plaintiffs on behalf of themselves and all other the creditors of *James Clark* the elder against the said *James Clark* the elder and his children, as defendants, to set aside certain gifts made by *James Clark* the elder in favor of his children, as being void against creditors under the statute of 13 Eliz. c. 5. The said *James Clark* the elder died pending the suit.

At the end of 1867 *James Clark* the elder, who carried on the business of a machine man, or the owner of steam threshing machines, which he let out for hire, was indebted to the plaintiffs, who were agricultural machine makers, in the sum of £350 on a balance of account.

At that time his property consisted of his stock in trade, comprising three steam threshing machines, valued at about £200 each, £300 deposited in a local bank, and a mortgage debt of £350.

On the 13th of June, 1868, *James Clark* the elder, who had nine children, gave a threshing machine to each of his three sons — *James Clark* the younger, *Mark Clark*, and *William Clark*; and by three several memorandums of agreement of that date, each of the said three sons agreed to pay to the father, in consideration of the said gift, an annuity of £20 during his life.

On the 7th of November, 1868, *James Clark* the elder divided 185] *the sum of £300 in the bank among his six daughters; and by an instrument dated the 12th of November, 1868, he assigned the mortgage debt of £350 to trustees, upon trust to divide the same among his said six daughters and the children of a deceased daughter.

The plaintiffs delivered their bill for the amount due to them on the 21st of May, 1868; and, after repeated applications for payment, they (not being aware that *James Clark* the elder had divested himself of his property) commenced an action against him. The action was undefended, and, on the 13th of April, 1869, they recovered judgment for £378 for their debt and costs. They issued a writ of *fi. fa.* upon the said judgment; but, in consequence of the said machines being claimed by the sons, they only recovered £16.

The plaintiffs charged that the machines were not made over to the defendants, *James Clark* the younger, *Mark Clark*, and *William Clark*, for the valuable consideration of the annuities, and *bonâ fide*, as the defendants alleged, but for the purpose of delaying, hindering, and defrauding the plaintiffs and the other creditors of *James Clark* the elder; and that the annuities were a very inadequate consideration for the said machines.

The plaintiffs further charged that the payments of £50 to each of the daughters, and the settlement of the said sum of £350, were not made upon any good consideration or *bonâ fide*, but for the same purpose and with the full knowledge of the defendants, and that the said gifts and assurances were fraudulent and void against the plaintiffs and the other creditors of James Clark the elder, and prayed a declaration accordingly, and consequential relief.

It appeared from the evidence that James Clark the elder was, at the time of the transactions complained of, in a very weak state of health and of mind, and shortly after the suit was instituted he became incapable of attending to his own affairs, and died intestate four months after the bill was filed.

The defendants to the suit were the said three sons of James Clark the elder, the daughters and their husbands, the children of the deceased daughter, and the trustee of the settlement of the 12th of November, 1868.

*The defence set up by his sons and daughters was in [186 substance as follows: That the gifts by James Clark the elder to his sons were for valuable consideration, and that all the transactions impeached were *bonâ fide*, and not made with any intention of defeating or delaying the plaintiffs or other creditors, but with the object of distributing the property of the donor among his children and grandchildren during his lifetime, instead of leaving it by will, and that they respectively were not aware, when they were parties to the several gifts and assurances in question, that James Clark the elder had no other means of meeting the claims of his creditors.

The evidence in the case, which was conflicting, sufficiently appears from the judgment.

Mr. Southgate, Q.C., and Mr. Begg, for the plaintiffs:

‘The evidence in this case fully supports the plaintiffs’ claim to have the gifts and assurances complained of set aside as fraudulent against creditors and within the scope of the statute 13 Eliz. c. 5: *Reese Silver Mining Company v. Atwell* ⁽¹⁾. Admitting that it was not the object of James Clark the elder to defraud his creditors, still if such was the effect of the transactions they cannot be sustained. Besides, the children who took an interest under these gifts must have been well aware of the effect of this distribution of their father’s property as regards the creditors.

The consideration of the annuities in respect of which the machines were made over to the three sons cannot prevent the operation of the statute as regards the gift in their favor: *Bott v. Smith* ⁽²⁾; *Mathews v. Feaver* ⁽³⁾. The transactions cannot be

(1) Law Rep., 7 Eq., 347.

(2) 21 Beav., 511.

(3) 1 Cox, 278.

supported, and we submit that these gifts must be declared void as against creditors.

Mr. *Fischer*, Q.C., and Mr. *Martineau*, for the three sons of *James Clark* the elder :

The arrangement under which the machines were transferred to these three defendants was a matter of bargain and not of bounty. The evidence shows that it was done without any intention 187] to *defraud, delay or hinder any creditors, for at that time the father was solvent. In *Bayspoole v. Collins* ⁽¹⁾ very slight consideration was held sufficient to support a settlement under the statute 27 Eliz. c. 4, as against a subsequent mortgagee, and the same principle would apply whether an alleged voluntary settlement is impeached by a purchaser or a creditor.

In *Moore v. Crofton* ⁽²⁾ Sir *E. Sugden* observed that the Court, in executing a contract for valuable consideration, will not weigh in very nice scales the amount of the consideration where it has been reduced fairly by reason of the relationship of the parties.

Here there could have been no inadequacy of consideration, for the tables show that an annuity for the life of the father could have been bought for £164, and the estimated value of each machine was £200.

Further, unless a debtor is indebted to the extent of insolvency the Court will not set aside a voluntary settlement on the ground of insolvency: *Thompson v. Webster* ⁽³⁾. In *Copis v. Middleton* ⁽⁴⁾, where an insolvent had sold his property for valuable consideration (the adequacy of which was disputed) to his nephew a month before his death, the Court refused to set the sale aside as being void as against creditors, because the vendor did not know of his own insolvency.

We submit that the transaction, being *bonâ fide* and for valuable consideration, cannot fairly be impeached as against the sons, and that the Court will not set it aside as against them by connecting it with the subsequent arrangement with the other children: *Harman v. Richards* ⁽⁵⁾.

Mr. *Culler*, for the daughters, contended that even if the settlement of the 12th of November, 1868, could be set aside, the statute could not apply to the pecuniary gifts of £50 to each of the daughters. There was no case in which it had been so held.

Mr. *Southgate*, in reply :

I admit that if the transactions in question were matters of bargain and not of bounty, and if they were conducted *bonâ* 188] *fide*, the Court could not set them aside, but the evidence here is quite the other way. With regard to consideration, two

⁽¹⁾ Law Rep., 6 Ch., 228.

⁽²⁾ 3 J. & Lat., 438, 443.

⁽³⁾ 4 Drew., 628; 4 De G. & J., 600.

⁽⁴⁾ 2 Madd., 410.

⁽⁵⁾ 10 Hare, 81

classes of cases have been confounded, for the Court does not apply so strict a rule in cases like *Ford v. Stuart* ⁽¹⁾, under 27 Eliz. c. 4, as to cases like the present, under 13 Eliz. c. 5. *Thompson v. Webster* ⁽²⁾, relied on by the other side, is not applicable, for it is clear that the sons of James Clark the elder were aware of their father's debts not being paid. The gifts in money to the daughters are void as well as the settlement: *Barrack v. M'Culloch* ⁽³⁾. I submit that the defendants have failed in their contention, and that the plaintiffs are entitled to a decree.

April 17. LORD ROMILLY, M.R. :

This is a suit instituted for the purpose of having certain transactions between James Clark the elder, deceased, and his children declared to be void as against his creditors under the 13 Eliz. c. 5.

[His Lordship then stated the facts of the case.]

When this case was first opened to me I did not sufficiently appreciate the condition of James Clark the elder and the conduct of his children. Having regard to the words of the statute, I was looking out for the marks of fraud on the part of the donor or settler, and I was met by the counsel for the defendants by a series of facts showing the repeated applications James Clark the elder made for the plaintiff's bill, and the repeated expressions introduced by James Clark the elder into his will, and in other ways, of his intention to pay the plaintiff's bill as well as all his debts.

A careful consideration of the case, and an attentive perusal of the evidence, has brought me to the conclusion that the distribution of the father's property amongst his children, was the act of his children, and that though the father assented to it, and even assuming that he had not the primary intention by so doing of defeating his creditors, still that the children who took advantage of his state to effect that object cannot profit by it.

No doubt the settlement of his affairs while alive was very fit *and proper. It would save the expense of a will, and of [189 probate and legacy duty, and every one must admit that the distribution he made of his property, whether it proceeded from himself or from his family, was fair and equitable so far as they were concerned. The only defect of it was, that it did not provide for the claims of his creditors. I look on the various gifts I have stated as forming part of one whole connected plan, and I am of opinion that the statute of 13 Eliz. c. 5 was passed to meet and counteract this particular evil by which the property of the debtor was removed out of the reach of the creditors. And I am of opinion that the acts of settler or donor are

(1) 15 Beav., 498.

(2) 4 Drew., 628; 4 De G. & J., 600.

(3) 3 K. & J., 110.

equally obnoxious to the provisions of the statute, whether they proceed from himself alone, or whether they are instigated by others. In this case I think the sons and daughters all knew the position of their father's health and circumstances, and that the object was to obtain a fair distribution of their father's property without any regard to the claims of his creditors. I think it of no moment in such matters whether the parting with the goods is by voluntary settlement or by gift, whether it is in anticipation of death or of bankruptcy, or whether it is by the free will of the donor, or whether it is at the instance of the donees. In this case I am inclined to think it was at the instance of the donees; but I think it equally invalid having regard to the scope and object of the statute.

I think also that the consideration of the annuity of £20 does not render the transaction valid. No doubt in such a case, whether mentioned or not, the children would support their parent. I should not have doubted that it was an implied, if not an expressed condition, and the introduction of this covenant to pay the annuity of £20 appears to me to be merely formal, and not to operate upon the transaction. I think the whole bad as against creditors, but merely as against them, and that the donees must rateably contribute to pay the debt and the costs of the suits.

May 5. The case was spoken to on minutes, and the form of decree was settled by the Court.

MINUTES: — Declare that the gifts by *James Clark* the elder of the three steam threshing machines to the defendants *James Clark* the younger, *Mark Clark*, 190] *and *William Clark* respectively, and of the said several sums of £50 to the defendants [the daughter], and the indenture of settlement dated the 12th of November, 1868, were and are respectively fraudulent and void, as against the plaintiffs and all other the creditors against the estate of the said *James Clark* the elder deceased and declare that as between the defendants the funeral and administration expenses and debts of the intestate, *James Clark* the elder, and the plaintiff's costs of the suit, ought to be borne and paid by the defendants, other than the defendant, the trustee of the said indenture of settlement, rateably in proportion to the amount or value of the said several gifts to them respectively, and of their respective interests under the said settlement; and this declaration to be without prejudice to the right of the plaintiffs to enforce this decree against all or any of the defendants, and against all or any part of the estate of the intestate, as they may be advised. Order that the proceeds of the sale of one of the machines (which had been sold), and the said several sums of £50, be paid into Court, and that the following accounts and inquiries be taken [the usual accounts and inquiries in a creditors' suit]. Liberty to apply at Chambers for a sale of the machines remaining unsold: the defendants other than the trustee to pay the plaintiff's costs up to and including the hearing: the trustee to retain his costs out of the surplus (if any) of the fund under the settlement. Reserve further consideration as to contribution of defendants *inter se*, and costs not before provided for.

Solicitor for the plaintiff: Mr. C. M. Stretton.

Solicitors for the defendants: Messrs. *White & Sons*, agents for Mr. R. Cates, *Fakenham*; Mr. W. G. Brighten, agent for Mr. J. Stanley, *Norwich*.

M.R. June 20, 21, 24, 1872.

KENT V. RILEY.

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[Law Reports 14 Equity cases 190.]

1871 K. 19.

Voluntary Settlement—Defeating Creditors—13 Eliz. c. 5.

In the absence of actual intent to defeat, delay, or hinder creditors, a voluntary settlement, made by a settlor in embarrassed circumstances, but having property not included in the settlement ample for payment of the debts owing by him at the time of making it, may be supported against creditors, although debts due at the date of the settlement may to a considerable amount remain unpaid.

This was a suit by the assignee in bankruptcy of *William Felix Riley*, instituted for the purpose of setting aside a post-nuptial settlement made by him under the following circumstances:

In February, 1868, William Felix Riley was entitled in fee *simple to a freehold house in Albemarle Street, subject to [191 several mortgages thereon, one of which was in favor of Colonel Leach. He was also entitled to some personal property, the value of which did not exceed £150. He had incurred simple contract debts to the amount of about £760, which he was unable to pay, and he applied to his solicitor, Mr. Francis Leach, the brother of Colonel Leach and an old friend of Riley's family, to procure him an advance of money. Mr. Leach replied to the application by a letter dated the 14th of February, 1868, in the following terms:

"I am extremely sorry to read your letter received to-day. You do quite right to ascertain exactly the extent of your liabilities. The sum you mention as owing indeed exceeds what I could have thought. Before I take any step I should wish to see you, because I think the time has come at which you ought to settle the residue of your property on your wife and children; and I cannot be a party to your raising any more money without your doing them this justice. If you will undertake to make the settlement I will see what can be done towards relieving you from your present difficulties. No creditor is, I should think, likely to press you; but should any come to me, I can but say that you propose to make arrangements for payment."

Mr. Leach subsequently had an interview with William Felix Riley, at which it was agreed that the former should procure from his brother, Colonel Leach, a further advance of £550 on the security of the house in Albemarle Street, and that the defendant should convey the equity of redemption to trustees upon trust to sell, and out of the proceeds pay off the mortgages, and then to pay a sum of £400 to William Felix Riley; and that the residue of the proceeds of sale should be settled upon trusts, partly for the benefit of his wife and children and partly for his own benefit.

Accordingly Colonel Leach advanced £550 on the security of a mortgage of the property, and by an indenture dated the 16th (subject to mortgages for sums amounting in the whole to of March, 1868, William Felix Riley conveyed the same property £3750) to trustees upon trust to sell, pay off the mortgage debts, and pay the sum of £400 to William Felix Riley; and to stand possessed of the residue of the proceeds of sale upon the trusts declared by an indenture of even date. The trusts so declared [192] were for investment *and payment out of the income of an annuity of £40 a year for the maintenance of the wife and children of William Felix Riley, or (in the discretion of the trustees) any one or more of them, and subject thereto for payment of the income to William Felix Riley during his life, and after his death for payment of the income upon the same trusts as were declared of the annuity of £40; and after the death of the survivor of Mr. and Mrs. Riley for the payment or application of *corpus* and income for the benefit of their children.

The property comprised in the settlement was sold in December, 1868, and after payment of the mortgage debts and the sum of £400 to William Felix Riley, there remained a surplus which was invested in £700 5 per cent. debenture stock of the South Eastern Railway Company upon the trusts of the settlement of the 16th of March, 1868.

A considerable part of the sum of £550 advanced by Colonel Leach was applied in payment of debts due by William Felix Riley; but the sum of £400, which arose from the sale, was applied by him for other purposes, and debts to the amount of upwards of £360, owing by him on the 16th of March, 1868, still remained unpaid.

On the 18th of March, 1869, William Felix Riley was adjudicated a bankrupt on his own petition, and the plaintiff was appointed creditors' assignee in the bankruptcy; and on the 3d of June, 1871, the bill in this suit was filed to set aside the settlement of the 16th of March, 1868, as being fraudulent under the statute 13 Eliz. c. 5.

Mr. *Hinde Palmer*, Q.C., and Mr. *Boyle*, for the plaintiff, relied on the following observations in the judgment of Lord *Westbury* in *Spirett v. Willows* ⁽¹⁾: "If the debt of the creditor by whom the voluntary settlement is impeached existed at the date of the settlement, and it is shown that the remedy of the creditor is defeated or delayed by the existence of the settlement, it is immaterial whether the debtor was or was not solvent after making the settlement. . . . It is obvious that the fact of a voluntary settler retaining money enough to pay the [193] debts which he owes at the *time of making the settlement, but not actually paying them, cannot give a different character

(1) 8 D. J. & S., 298, 802.

M. R.

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to the settlement, or take it out of the statute. It still remains a voluntary alienation, or deed of gift, whereby in the event the remedies of creditors are delayed, hindered, or defrauded." The cases of *Freeman v. Pope* ⁽¹⁾ and *Bott v. Smith* ⁽²⁾ showed that a deed might be set aside though consideration was given for it.

Sir *R. Baggallay*, Q.C., and Mr. *Grenside*, for the defendants:

A settlement is only void under the statute when it is made with intent to delay, hinder, or defraud creditors. If a settlement is made voluntarily, and the necessary effect of the settlement is to defeat, delay, or hinder creditors, then the intent will be presumed; but if such be not the necessary effect of the settlement, then some proof must be given of the actual intention. Here the necessary effect of the deed was not to defeat, delay, or hinder creditors; for by means of it funds were to be raised which would have been amply sufficient for payment of all the settler's debts. Neither is there any evidence of actual intent to defeat, delay, or hinder creditors; on the contrary, the letter of Mr. *Leach* shows that the primary object was to raise sufficient funds for the payment of debts. There is sufficient consideration to support this settlement, for a further advance of £550 was obtained from a prior mortgagee, on the understanding that this settlement should be made.

There have been great fluctuations in the opinion of Judges as to what must be proved in order to show a fraudulent intent. In *Walker v. Burrows* ⁽³⁾ it was held sufficient to show that a voluntary settler was indebted, at the time of making the settlement, to some person whose debt remained unpaid; but that is no longer law. In *Skarf v. Soulby* ⁽⁴⁾ it was laid down that the existence of property at the time of the settlement, not included in it, and ample for the payment of debts then due, would negative the fraudulent intention. The dicta of Lord *Westbury* in *Spirett v. Willows* ⁽⁵⁾ are inconsistent with this, but they were not necessary for the decision of that case, and have been disapproved of in **Freeman v. Pope* ⁽¹⁾. If value is given for [194 the settlement, fraudulent intent must be proved: *Holmes v. Penney* ⁽⁶⁾. That the consideration here given was sufficient is shown by the cases of *Thompson v. Webster* ⁽⁷⁾: *Bayspoole v. Collins* ⁽⁸⁾.

Mr. *Hinde Palmer*, in reply:

I admit, on the one hand, that the mere fact of a man owing few debts at the time he makes a voluntary settlement will not a

⁽¹⁾ Law Rep. 5 Ch., 538.

⁽²⁾ 21 Beav., 511.

⁽³⁾ 1 Atk., 98.

⁽⁴⁾ 1 Mac. & G., 364, 375.

⁽⁵⁾ 3 D. J. & S., 293.

⁽⁶⁾ 3 K. & J., 90.

⁽⁷⁾ 4 De G. & J., 600; affirmed in D. P. 7 Jur. (N.S.) 531.

⁽⁸⁾ Law Rep. 6 Ch., 228.

afford sufficient ground for setting aside the deed. On the other hand, it is not necessary to prove actual insolvency at the date of the deed. But if a man, being largely indebted, makes a voluntary settlement, and shortly afterwards becomes insolvent, the deed can not be supported: *Crossley v. Elworthy* ⁽¹⁾. It is true that some of the *dicta* in *Spirell v. Willows* ⁽²⁾ were criticised in *Freeman v. Pope*; but after making every allowance, there still remains enough of that judgment unimpeached to afford sufficient ground for deciding in favor of the plaintiff in this case. As for the alleged agreement or understanding upon the faith of which the settlement was made, it was an agreement between the plaintiff and his own solicitor, and can no more support the settlement than the mere desire on the part of the settler to provide for his family.

JUNE 24. LORD ROMILLY, M.R., said that the plaintiff sought to set aside a deed on the ground that it was executed with intent to defeat, delay, or hinder creditors. As had often been observed in these cases, it was impossible to penetrate into a man's mind and ascertain what his intentions were; the facts only could be looked at in order to ascertain what inference could fairly be drawn as to the intention of the settler. Looking at the facts proved in this case, and particularly at the letter of Mr. Leach, of the 14th of February, 1868, it appeared to his Lordship impossible to come to the conclusion that this settlement was made with the intent to defeat, delay, or hinder creditors; on the contrary, the conclusion he arrived at was that 195] the object of the settler was to pay his *creditors, and for that purpose to raise sufficient money by mortgage of his property, and then to make a settlement of the residue only. The settlement, therefore, could not be set aside; but as the suit had been occasioned by the improper conduct of the settler in not paying his debts by means of the funds raised, the bill would be dismissed without costs; but the trustees of the settlement might take their costs out of the settled funds.

Solicitors: Messrs. Saffery & Huntley; Mr. F. Leach.

⁽¹⁾ Ibid., 12 Eq., 158.

⁽²⁾ 8 D. J. & S., 293.

V.-C.M. May 27, 1872.

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*HUGO v. WILLIAMS.

[Law Reports, 14 Equity Cases 224.]

1872 H. 88.

Construction of Will — Estate for Life or in Tail.

A testator devised a freehold estate to trustees upon trust to permit his son, G. A., and his assigns to receive the rents, issues, and profits during his life, and

after his death upon trust to permit the first son of *G. A.* and the heirs male of his body to receive the rents, &c., during their respective lives severally and successively in tail male:

Held, that the first son of *G. A.* took an estate tail in the property, and not merely a life estate.

THIS bill was filed by the vendor of an estate against the defendant for specific performance of a contract to purchase the estate. The defendant demurred for the purpose of obtaining the opinion of the Court whether or not the plaintiff could make a good title.

The question arose under the will of *C. F. Andrew*, dated in May, 1840, whereby the testator gave and devised all his manor of *Nansough* unto and to the use of *H. P. Andrew* and *G. N. Simmons* and their heirs, upon trust, in the first place, to raise certain legacies, and, subject thereto, upon trust to permit his son, *G. H. Andrew*, and his assigns to receive the rents, issues, and profits of the said manor of *Nansough* during his natural life, and upon and immediately after his decease upon trust to permit the first son of his said son, *G. H. Andrew*, lawfully begotten, and the heirs male of his body lawfully issuing, to receive the rents, issues, and profits of the said manor for and during their respective lives severally and successively in tail male, and in default of issue male of such first son, upon trust to permit the second, third, and all and every other the son and sons of his said son *G. H. Andrew*, severally and successively, according to their seniority and priority of birth, and the issue male of their respective bodies severally and successively in tail male, to receive the rents, issues, and profits of the said manor for and during their respective lives; and in default of such issue, upon trusts in precisely similar words in favor of several other sons and their children; and in default of issue male of such sons, upon trust for the testator's own right heirs for ever.

*The testator died in June, 1840, and his son *G. H.* [225 *Andrew*, died in March, 1858, having had one son, *C. F. Andrew*, who attained twenty-one in May, 1869. On the 3d of June, 1869, *C. F. Andrew*, the grandson, assuming to be tenant in tail in possession under the will of the *Nansough* estate, executed an indenture whereby he conveyed and assured that estate to *Robert Rendell* and his heirs, freed from all estates tail and from all estates and interests, to take effect after the determination or defeasance of any such estate tail, to the use, however, of the said *C. F. Andrew*, his heirs and assigns, for ever; and that indenture was duly inrolled in Chancery as a disentailing assurance. The plaintiffs, who claimed under *C. F. Andrew*, the grandson, alleged that he was, at the time of executing the said disentailing deed, entitled, as tenant in tail in possession under the said will, to the *Nansough* estate, and that by the operation

of that deed he became tenant in fee simple of the same estate; and if this were so, and not otherwise, they could make a good title to the defendant as purchaser of that estate.

The defendant insisted that C. F. Andrew, the grandson, did not, upon the true construction of the said will, ever become tenant in tail thereunder of the said estate, and upon that ground only he refused to complete his purchase except under a decree of the Court.

Mr. *Charles Hall*, in support of the demurrer :

The only question for the Court to decide is, whether, on the construction of the will of C. F. Andrew, the testator, there was an estate tail created of the Nansough estate in the grandson of the testator, in which case the vendor can now make a good title; or whether the testator intended to create a succession of life estates, in which case the vendor will be unable to make a good title. The purchaser is willing to complete his contract if the Court should be of opinion that the title is good.

The question arose in the case of *Seaward v. Willock* ⁽¹⁾, in which there was a devise to A. for life, and after him to his eldest or any other son after him for life, and after them to as many of his descendants issue male as should be heirs of his or 226] their bodies down *to the tenth generation, during their natural lives; and it was held that A. took no more than a life estate; and the question also arose in *Mortimer v. West* ⁽²⁾, *Monypenny v. Derring* ⁽³⁾, and *Doe v. Stenlake* ⁽⁴⁾.

Mr. *Phear*, for the plaintiff, was not called upon.

SIR R. MALINS, V.C. :

The question raised upon this will is whether the limitation in favor of the first son of the testator's son, G. H. Andrew, creates an estate tail, in which case the title of the plaintiffs is a good title, or whether it has created a life estate only, in which case the title of course is bad. What then is the effect of a devise to A, and his heirs during their lives? It is settled in the case of *Doe v. Stenlake* by the Court of King's Bench, and has been acquiesced in ever since, that a devise to A, and his heirs during their lives created an estate in fee simple. Lord Ellenburgh there gives the true explanation of such a devise. He says: "The words 'during their lives' after the devise to the daughter and her heirs are merely the expression of a man ignorant of the manner of describing how the parties whom he meant to benefit would enjoy the property; for whatever estate of inheritance the heirs of his daughter might take, they could in fact only enjoy the benefit of it for their lives." That is upon a devise to a man and his heirs, which is an estate

(1) 5 East, 198. (2) 2 Sim., 274. (3) 2 D. M. & G., 145. (4) 12 East, 515.

capable of being enjoyed for ever. This is a limitation to a man and the heirs male of his body for their lives. I think the limitation to the heirs male of his body creates an estate tail, and the intention of the testator that there should be an estate tail is more distinctly shown by the gift over in case the taker should die without issue male. It is an estate in tail male, and the words "during their lives" mean only that which is necessarily implied, that whoever takes under the limitation can only, in point of fact, have the enjoyment of it during his life. But it has not the effect of cutting down the estate of inheritance. The son, therefore, took the estate in tail male. He has suffered a recovery, and the plaintiffs claiming under him take an estate in fee simple, and the title is good.

*The demurrer will therefore be overruled. [227]

I have been asked to preface the decree with the words, "This Court being of opinion that the first son of George Hugo Andrew took an estate in tail male, overrule the demurrer." This form of decree has been questioned by the Registrars; but I believe it is now settled that there is no objection to it. I will therefore make the decree in that form.

Solicitors for the Plaintiff: Messrs. *Gregory, Rowcliffes, & Rawle*.

Solicitors for the Defendant: Messrs. *Bell & Stewards*.

V.-C.M., June 21, 1872.

**In re ALCHIN'S TRUSTS. Ex parte FURLEY. Ex parte* [230]
EARL ROMNEY.

[Law Reports, 14 Equity Cases, 230.]

Will — Charitable Gift — "Hospital" held to mean a general as distinguished from a special Hospital.

Gift by will to the *Kent County Hospital*. There being no hospital having precisely that name:

Held, that a general hospital must be presumed to have been intended, and the *Kent County Ophthalmic Hospital* could not take the legacy, and that it must be divided between two hospitals — viz., the *Kent and Canterbury Hospital* and the *West Kent General Hospital*, which together supplied the place of a general county hospital.

RICHARD THOMAS ALCHIN, by his will, which was dated the 25th of October, 1869, gave a legacy of £500 "to the treasurer for the time being of the Kent County Hospital, in aid of that institution." The testator died on the 1st of June, 1871, and the legacy became reduced by the operation of the Mortmain Act to the sum of £321 18s. 10d., which was paid into Court by the executors.

By their affidavit, on paying this sum into Court, the executors stated that they were unable to ascertain what hospital the testator intended; but they mentioned the Kent and Canterbury

231] *Hospital, situate at Canterbury; the West Kent General Hospital, situate at Maidstone; the Royal Kent Dispensary, situate at Greenwich; and the Kent County Ophthalmic Hospital, situate at Maidstone, as being the only charities having any similarity of name.

Petitions were presented almost simultaneously by the Kent and Canterbury Hospital and the West Kent General Hospital. The Kent and Canterbury Hospital was described as being an institution for the treatment of all classes of cases in every part of the county of Kent, and as having been established in the year 1793. The West Kent General Hospital was founded in the year 1782, under the name of the West Kent Infirmary and Dispensary, and assumed its present name in 1862.

The facts appearing in evidence were, that Maidstone, where the West Kent General Hospital and the Kent County Ophthalmic Hospital were situated, was only four miles from Linton, where the testator was born and passed the first nineteen years of his life; that since the formation of the West Kent General Hospital it had relieved cases coming principally from the western side of the county, and that during the same period the Kent and Canterbury Hospital had been chiefly occupied by cases from the eastern side of the county. It also appeared that the testator was the owner of some property at Greenwich, where the Royal Kent Dispensary was situated; that it was founded in the year 1783, and relieved cases from Greenwich and the country round. It was never a hospital in the sense of finding beds for patients; but it appeared that at one time, about the period when the will was made, steps were taken with a view to building a hospital in connection with it, but that the intention was afterwards abandoned. The Kent County Ophthalmic Hospital was founded in 1847, and relieved cases from the whole of the county of Kent.

Mr. *Freeman*, for the Kent and Canterbury Hospital:

[The VICE-CHANCELLOR: It must be very doubtful what institution the testator intended. Would it not be better to divide the fund?]

We are willing to divide it with the West Kent General Hospital, but not with the other claimants.

232] *Mr. *Culler*, for the West Kent General Hospital:

Bradshaw v. Thompson ⁽¹⁾ is a distinct authority that it must be presumed that the testator had in his mind a general hospital, and the Kent County Ophthalmic Hospital must be excluded, as being for a special object only.

(1) 2 R. & C. Ch., 295.

Mr. Waller, for the Kent County Ophthalmic Hospital:

There is an actual decision of Vice-Chancellor Stuart that, under a similar designation, this hospital was intended. That was in a suit of *Pownal v. Beckett*; and the Vice-Chancellor, having first directed an inquiry in Chambers, decided that this hospital was entitled. I claim the whole legacy, but would acquiesce in a division amongst the three charities.

Mr. Oswald, for the Royal Kent Dispensary:

Where it is doubtful what charity the testator intended, the only course is to divide the fund amongst all possible claimants; and there is just as much reason for introducing this institution into the division as any other: *Waller v. Childs* ⁽¹⁾; *Simon v. Barber* ⁽²⁾; *In re Kilvert's Trusts* ⁽³⁾; *Bennett v. Hayter* ⁽⁴⁾.

Mr. Batten, for the executors.

SIR R. MALINS, V. C.:

The testator has given a legacy of £500 to the Kent County Hospital. If there had been any such hospital, then, for the reasons stated by me in the opening of the judgment *In re Kilvert's Trusts*, that hospital must have taken the legacy; but there is no hospital of that name. Now, I must assume the testator intended the gift for a hospital, for if he had intended a dispensary he might have said so. Therefore I cannot give any part of the legacy to the Royal Kent Dispensary.

Then there are three hospitals. First, there is the Kent and Canterbury Hospital. It is true, it is not called the Kent County Hospital, but it is both a Kent hospital and a county hospital; *therefore I think that it must take part of the gift. But [233] I think that the West Kent General is also entitled to shares. I am satisfied the testator intended the legacy for one hospital only, but neither of the institutions completely answers the description. It must therefore, at all events, be divided between the two, as I considered to be the proper course in *In re Kilvert's Trusts* ⁽³⁾, and as was done in *Simon v. Barber* ⁽²⁾. Then the next question is, whether the Kent County Ophthalmic Hospital should also take a share. It is also a Kent hospital and a county hospital, but it is not a hospital of a general character; and when the testator speaks of a county hospital, I understand him to mean one of a general character. In *Bradshaw v. Thompson* ⁽⁵⁾ the Vice-Chancellor, in rejecting the claim of the Westminster Ophthalmic hospital, treated the word "ophthalmic" as a most important part of the name. I think that consideration applies to the present case; the legacy will con-

⁽¹⁾ Amb., 524.

⁽²⁾ 5 Russ., 112.

⁽³⁾ Law Rep., 7 Ch., 170.

⁽⁴⁾ 2 Beav., 81.

⁽⁵⁾ 2 Y. & C. Ch., 295.

sequently be divided between the two institutions I have named. With regard to the decision of Vice-Chancellor *Stuart* in *Pownall v. Beckett*, if it had been a simple decision on the construction of the words, I should have held myself bound by it; but I am satisfied that it depended on the particular circumstances of the case.

Solicitors: Messrs. *Kingsford & Dorman*; Messrs. *Monckton & Monckton*; Messrs. *Palmer, Palmer, & Bull*; Mr. *Bristow*; Mr. *Evans*.

V.-C.M. June 24, 1872.

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*DUGDALE V. DUGDALE

[Law Reports, 14 Equity Cases, 284.]

1869 D. 146.

Construction — Deficiency of Personal Estate — Marshalling — Legacy and Real Estate — Court of Appeal — Erroneous Decision.

Where a previous decision, even of the Court of Appeal, is clearly based upon a misapprehension, the Court is not bound to follow it.

A testator after giving a pecuniary legacy devised his real estate to other persons than the legatee, not charging it with his debts. There being a deficiency of personal estate for payment of debts:

Held, that the real estate was not bound to contribute rateably with the legacy to meet the deficiency.

Hensman v. Fryer (¹) not followed.

THIS suit now came on for further consideration.

Henry Dugdale, the testator in the cause, by his will, dated the 25th of January, 1859, gave his wife *Grace Dugdale*, a legacy of £500, to be paid to her within one month of his death; and after certain other dispositions, devised all those his manors, messuages, or tenements, farms, lands, ground rents, hereditaments, and premises of whatsoever tenure, freehold, copyhold, or leasehold, of or to which he was or at his death should be seized or entitled for any devisable estate or interest, or which he had power to dispose of by his will (except estates vested in him as a trustee or mortgagee), situate in the counties of Lancaster and York or elsewhere, to trustees upon trust, as to one moiety, for his wife during widowhood, and subject thereto upon certain trusts in favor of his children.

The will contained no charge of debts upon the real estate.

The testator died on the 13th of May, 1869. His personal estate proved insufficient for payment of his debts.

At the hearing, on the 11th of December, 1869, a declaration was asked for, on the part of the widow, to be inserted in the decree, in accordance with the decision in *Hensman v. Fryer* (¹), that the legacy of £500 and the real estate were liable to contribute rateably to the deficiency; but the Vice-Chancellor considered

(¹) Law Rep., 8 Ch., 480.

the * authority of that case so doubtful that he declined [235 to make such a declaration at the time, but left the question to be determined on the further consideration.

The plaintiffs were two of the testator's infant children.

Mr. Cotton, Q.C., and Mr. W. Barber, for the plaintiffs:

Hensman v. Fryer ⁽¹⁾ is exactly in point. It is a decision of the Court of Appeal, and is binding on this Court, and the bill is framed on the supposition that it is a binding authority.

Mr. Pearson, Q.C., and Mr. Bedwell, for some of the defendants; and Mr. Glasse, Q.C., and Mr. E. S. Ford, for the trustees, were not called upon.

SIR R. MALINS, V.C.:

The point as to marshalling the deficiency between the legacy and the real estate, was decided in *Hensman v. Fryer* under a misapprehension as to the effect of the decision in *Tombs v. Roche* ⁽²⁾, and I must refuse to follow it. The court is not bound to follow a decision even of the Court of Appeal if clearly erroneous. There were in my recollection no less than three decisions of Lord Westbury which Vice-Chancellor Stuart declined to follow. One of the cases in which he did so was *Drummond v. Drummond* ⁽³⁾, which afterwards went to the Court of Appeal ⁽⁴⁾, and the decision was affirmed.

Solicitors: Messrs. Milne, Riddle & Mellor; Messrs. Johnston & Jackson.

V.C.M. June 25, 26 1872.

* In re PEACOCK'S ESTATE.

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[Law Reports 14 Equity cases 336.]

Legacies — Advances during Lifetime — Deductions from Residuary Bequest.

A testator gave to three of his sons, Thomas, John, and Peter, legacies of £500 each, and to his daughter £200, and directed that neither of his sons to whom he should have advanced any sums of money in his lifetime should be entitled to receive his said legacy of £500 without bringing such sums into hotchpot. The residue of his property he divided between his four sons, Charles, Thomas, John, and Peter, and his daughter. The testator had advanced to Charles, at different periods before the date of his will, £500, £170, and £58, and to Thomas, after the date of his will, £500 and £390:

Held, that the advances to Charles should not be taken into account against him, but that the £500 to Thomas was a satisfaction of his legacy, and the £380, being advanced after the date of the will, must be deducted from his share of the residue.

CHARLES PEACOCK, by his will, dated the 22d of May, 1861, gave and bequeathed all his personal estate and effects whatsoever and wheresoever to his two sons, Charles and John Peacock, upon trust for his wife for life, and upon her decease upon trust to pay to his sons Thomas, John, and Peter, on their

⁽¹⁾ Law Rep. 3 Ch., 420.

⁽²⁾ 2 Coll., 490, 502.

⁽³⁾ Law Rep. 2 Eq., 335.

⁽⁴⁾ Ibid. 2 Ch., 32.

1872

In re Peacock's Estate.

V.-C.M.

severally attaining the age of twenty-one, the sum of £500 a piece, and to invest for his daughter Martha the sum of £200; and the testator continued: "And I do hereby direct that neither of my said sons to whom I shall have advanced any sum or sums of money in my lifetime shall be entitled to receive his said legacy of £500 without bringing such sum or sums so advanced to him into hotchpot; and from and after such payments as aforesaid upon trust to divide the residue of my personal estate into four equal parts, and to pay and divide three of such four equal parts unto and equally between the whole of my sons Charles, Thomas, John and Peter, share and share alike as tenants in common;" and as to the remaining fourth part, the testator gave the same in trust for the separate use of his daughter Martha Peacock.

The testator died on the 18th of June, 1863. During his life he had advanced various sums of money to his children, which were entered in an account book in the following manner:

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* "Advances.

" Martha Peacock . . .	Dec. 3, 1851 . . .	£300
ditto . . .	Dec. 16, 1859 . . .	30
ditto . . .	March 15, 1860 . . .	20
" Chas. Peacock . . .	May 22, 1857 . . .	500
ditto . . .	May 22, 1859 . . .	170
"that I have to give account for." (Signed) Chas. Peacock.		
ditto Had at different times		£58
"Thos. Peacock . . .	June 18, 1863 . . .	£380
"that I have to give account for." (Signed) Thos. Peacock.		
"Thos. Peacock . . .	June 18, 1863 . . .	£500

The questions now raised on petition were, what advances were to be taken in account against the testator's sons, Charles and Thomas Peacock.

Mr. Cole, Q.C., and Mr. Ince, for the Petitioners:—

The words of the clause in the testator's will distinctly apply to all advances made to his sons during his lifetime. These advances are to be brought into hotchpot, and must consequently be deducted from the share which each son is entitled to out of the residue. The two sons, Charles and Thomas Peacock, signed receipts in the testator's account book for the sums paid to them, acknowledging that they were to be accounted for. The case is, therefore, precisely similar to *Upton v. Prince*,⁽¹⁾ where it was held that a sum of £1500, advanced to a son during the testator's lifetime, was to be taken in satisfaction of a legacy left to him. Where a man gives equal portions to his sons, and then advances to them during his life sums of money

(1) *Cas. t. Tal.*, 71.

admitted by them, those advances must be taken in reduction of the portion given by the will. In the case of *Thomas Peacock* there can be no doubt as to the intention of the testator, since the advances to him were made after the date of his will. In the case of *Montefiore v. Guedalla* ⁽¹⁾, where there was a bequest of a share of residue for the benefit of the testator's son and his family, that was held to be adeemed by a subsequent advance by way of settlement on the son's marriage. In *Schofield v. Heap* ⁽²⁾, sums were advanced by a testator to his children on *their marriage and to establish them in business, [238 which were held to be a satisfaction *pro tanto* of their shares of the residue bequeathed to them by his will; but this did not apply to small gifts made to the children from time to time by the testator. The same principle as to small gifts by a testator was applied in the case of *Watson v. Watson* ⁽³⁾.

Mr. *Macnaghten*, for the husband of the testator's daughter, followed the same argument.

Mr. *Pearson*, Q.C., and Mr. *North*, for *Charles Peacock*:

The direction in the will is that neither of his sons to whom he should have advanced any sums of money should be entitled to receive his legacy of £500 without accounting for the same. This applies only to sums advanced up to £500, the amount of the legacy, and not to other sums advanced from time to time in small amounts. To *Charles Peacock* the testator gave no legacy, because he had advanced £500 to him before the date of the will. That will stand in satisfaction of the legacy, but the other sums also paid before the date of the will must be taken as small advances, and will come within the case of *Watson v. Watson*. They were not substantial advances, but trivial payments, such as a father might be supposed to give his child.

Mr. *Everitt*, for other parties in the same interest.

Mr. *Wright*, for *Thomas Peacock*, submitted that neither the £380 nor the £500 advanced to him by the testator ought to be taken in account against him.

SIR R. MALINS, V.C. :—

In the first place it is observable that the testator directs his trustees to pay to his three sons, *Thomas*, *John*, and *Peter*, a legacy of £500 each, and to his daughter *Martha* £200. Now he had a son *Charles*, to whom he gave no legacy, which is accounted for by the fact that he had advanced to him before the date of his will a sum of £500, and having advanced to *Martha* a sum of £300, he gave her only £200, showing clearly that he intended to put all *the children on an equality. After [239

⁽¹⁾ 1 D. F. & J., 93.

⁽²⁾ 27 Beav., 93.

⁽³⁾ 83 Beav., 574.

this he directs that neither of his sons to whom he should have advanced any sum or sums of money in his lifetime should be entitled to receive his legacy of £500 without bringing such sum or sums so advanced to him into hotchpot. There are two questions arising upon this clause. The first is, whether the son Charles, to whom, in addition to the £500, advances of £170 and £58 were made during the testator's lifetime and before the date of the will, is bound to bring those sums into account and deduct them from his share of the residue. It has been argued for him that the testator did not intend any advances to be taken into account except such as went to the reduction of the legacies of £500 each, and I think that is the proper construction to be put upon the clause. It is true that in some respects the clause in the case of *Upton v. Prince* ⁽¹⁾ has a resemblance to this case; but when you look at the circumstances, there is a great difference between the cases. There the testator had two sons, William and Peter, and four daughters, and in his lifetime gave his two sons £1500 a piece, for which he took their receipts, acknowledging that such sums were to be on account and in part of what the father should give them by will. Then, by his will, the testator recited that he had advanced to his children, William, Elizabeth, and Sarah, £1500 each, omitting any mention of Peter, to whom he had also advanced £1500; and he thereby in like manner gave to his three other children, Peter, Mary, and Anne, the several sums of £1500 a piece, and then gave the residue equally among all his children. The argument on behalf of Peter was that the omission of his name by the father in the recital of advancement showed that he plainly intended a difference between his sons, the receipts given by both and the case of both being the same. The decree there was that the £1500 received by Peter in his father's lifetime was a satisfaction for what the father had given him by his will, and that he should not have another £1500.

Now, does that apply to the present case? I think not; and the words here are by no means the same. Here the testator directs that neither of his sons to whom he should have advanced any sums of money in his lifetime, should be entitled to receive his legacy of £500 without bringing such sums into hotch-
240] pot. That amounts, in my opinion, to a declaration that only those sums advanced towards payment of the legacy of £500 should be deducted, and not any small sums which might have been advanced.

With regard to the small sums advanced, I consider the case of *Watson v. Watson* ⁽²⁾ an authority for deciding that small amounts doled out at different times are not to be taken into

⁽¹⁾ Cas. t. Tal., 71.

⁽²⁾ 88 Beav., 574

account, whether given before or after the date of his will. I must, therefore, decide that none of the sums advanced to Charles are to be taken into account against him, or deducted from his share of the residue.

The next question is as to the advances made to the testator's son Thomas. I consider that the £380 must stand in a different position from the two sums of £170 and £58 advanced to Charles Peacock, since that sum was paid after the date of the will, and that must, consequently, be deducted from his share of the residue. Then as to the £500 advanced to Thomas on the day of the death of the testator, it is not consistent with honesty that he should not account for that sum, for it is palpable that the father considered that advance to be in satisfaction of the legacy of £500.

The general rule is, that whenever a testator gives an equal amount to all his children, and directs that any sums advanced shall be taken as part of the legacies, all money advanced after the date of the will, except small sums given from time to time, must be accounted for.

It will therefore be declared that the £500 advanced to Charles will not be taken into account against him, nor will the other advances made to him; but that the advance of £380 to Thomas will be deducted from his share of the residue, having been made after the date of the will, and his legacy of £500 will be declared satisfied by the payment on the day of the death of the testator.

Solicitors for the Petitioners: Messrs. *Doyle & Edwards*.

Solicitor for the Respondents: Mr. *J. Wilkinson*.

V.-C.M. June 26, 1872.

*LLOYD v. PUGHE.

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[Law Reports 14 Equity cases 241.]

1869 L. 8.

Wife's Separate Estate — Bankers' Account in Name of Wife — Executrix Account.

A wife being executrix of her father paid the moneys she received into a bank in her own name as such executrix. The husband, it was alleged, sometimes paid in money to this account, and the wife paid checks to her husband's creditors. The account remained for six years, when the husband died, and the wife died shortly afterwards:

Held, that if the money, or any part of it, belonged to the husband, he had shown an intention of making a gift of it to his wife, and it constituted part of her estate at the husband's death.

MRS. LLOYD was the executrix and a residuary legatee of her father, Mr. Hugh Jones. She had received various sums of money as such executrix, and had paid them into the North and South Wales Bank to the account of "Mrs. Elizabeth Lloyd,

Llanrwst, sole executrix of the late Mr. Hugh Jones." The account was opened in May 1862. It was in evidence that other sums besides those which Mrs. Lloyd had received as such executrix were paid into the bank to the same account by her husband, and that checks were drawn by her for debts due by her husband, and for payment of tradesmen and other mutual creditors of husband and wife.

The husband died in July, 1868, and the wife died in September of the same year. The husband at the time of his death was indebted to the extent of about £100. Two suits were instituted. The first suit was for the administration of the wife's estate, in which it was alleged that she was at the time of her death possessed of considerable personal estate of her then late husband Edward Walmsley Lloyd, and which was and is subject to certain debts and liabilities of the said E. W. Lloyd.

Another suit was instituted to administer the estate of E. W. Lloyd, the subject of which was about £200, the produce of his household furniture and effects, which being actually in his possession at the time of his death, formed part of his estate.

The chief clerk had found that at the time of the death of the husband the balance of the account standing in the name of 242] Mrs. *Lloyd in the North and South Wales Bank belonged to the husband, but that it became the wife's and that her estate was indebted to the husband's estate.

The causes now came on upon further considerations and summons to vary the chief clerk's finding, and the only question raised was, whether the sum of £374 in the bank formed part of the wife's separate estate, or whether a claim made against that account by the creditors of her deceased husband could be sustained.

Mr. Cotton, Q.C., and Mr. Bradford, for the representatives of Mrs. Lloyd:

The money now claimed as belonging to the husband was received by Mrs. Lloyd as executrix of her father, and the account was opened in her name as such executrix. It was standing to her account up to the death of the husband, and he never took any steps to claim it or reduce it into possession. On the contrary, he allowed her to continue the owner, and it is said that he paid in money of his own to the same account. If he did so it was a gift to his wife, at a time when he was perfectly competent to make such a gift, and there was nothing unreasonable in his doing so, as he benefited largely by the property derived from his wife's relations. The only debt of the husband was of a trifling amount, and was contracted shortly before his death. His creditors can have no claim upon this money, and the finding of the chief clerk ought to be reversed.

Mr. *Cole*, Q.C., and Mr. *Rigby*, for the creditors of the husband:

Mrs. Lloyd, no doubt, received various sums of money as executrix of her father, but the account at the bank was a mutual account of husband and wife, out of which all the creditors of the husband, for the expenses of house keeping, were paid for many years. It was, in fact, a family account, although for convenience it was allowed to remain in the name of the wife. It cannot be said that the amount standing to this account was the executrix account, as it must have been diminished or increased from day to day as the wants of the family required. It was in every respect the husband's money. If it had not been so, and if it was the wife's *separate estate, it is impossi- [243] ble to account for her having paid her husband's debts out of it.

Mr. *Procter*, for the plaintiff in the suit for the administration of the husband's estate.

SIR R. MALINS, V.C. :

The question which has been argued is whether a sum of £374, which stood to the credit of a banking account which was opened in May, 1862, formed part of the estate of the husband or of the estate of the wife. The account was opened in the North and South Wales Bank in these terms: "Mrs. Elizabeth Lloyd, Llanrwst, sole executrix to the late Mr. Hugh Jones." Now what was the meaning of opening this account in the name of the wife? The husband of an executrix is complete executor, gives receipts, sues, and does everything that the executrix can do. By this account, therefore, I can only treat him as having intended that his wife should, in respect of her father's property, have it under her sole dominion and be sole owner. That account is continued from 1862 down to 1868, when both the husband and wife died — the husband in July, and the wife in September. It appears that at the time of the husband's death he was indebted to a very trifling amount, and the debt in respect of which the suit has been instituted for the administration of his estate appears to have arisen shortly before his death. I am, therefore, unable to see that he was at any time incompetent to make the gift to his wife. Then, what is the meaning of a husband putting money in the name of his wife? It is not necessary for him to say anything. You can only infer the intention from the act; and *Dummer v. Pitcher* ⁽¹⁾ has settled it finally, that wherever a husband does that, the law itself presumes it was with the intention of making a gift to his wife. Therefore, this husband being, as far as I can see, perfectly in a situation to do so, and the main source of the money being the

(¹) 5 Sim., 35; 2 My. & K., 262.

property which the wife got from her father, if he chooses to say. Now you shall be the purse bearer, I will put into your name all I have, and you will draw out all we want for our subsistence, I can see no impropriety or inconsistency in the intention which *the law, in fact, attributes to the husband in such a case, that the property should become the absolute property of the wife if she survived him.

But it is said that part of this money was received by the husband, and did not properly belong to the executorship, though it was paid into this account, and that money was drawn out for the purpose of their living. All that, I think, may very fairly be assumed; but, from the irresistible effect of the conduct of the husband, in my opinion, by putting the account into the name of his wife, as it originally was as executrix, and continuing to pay his money, if he did pay his money, into that account, I can only attribute to him the intention which I think the law attributes to him, namely, that he intended the consequences of law should take place—that if she survived him, whatever was remaining to the credit of that account should be hers. I can see no improbability in it whatever. The chief clerk has found that at the time of the death of the husband the balance of the account was the husband's, but that it became the wife's, and that her estate is indebted to the husband's estate. How it is made out that she is indebted I am quite at a loss to see. I cannot concur in that finding; and the exception which has been opened is to show that this was an erroneous conclusion. I entirely agree that it is erroneous; and, for the reasons I have stated, I am of opinion that the £374 was, at the time the husband died, part of the wife's estate.

Solicitors for Mrs. *Lloyd's* estate: Messrs. *Rooks, Kenrick, & Harston.*

Solicitors for the creditors: Messrs. *Cole, Cole, & Jackson.*

The deposit of money to the credit of a wife or relative in the absence of evidence, showing a contrary intention is a valid gift thereof. *Caton v. Rideout*, 1 Mac Naghten & Gordon, 599; *Mills-paugh v. Putman*, 16 Abb. Prac. Rep., 380.

So the taking of notes payable to a wife. *Scott v. Simes*, 10 Bosw., 314; *Fulton v. Fulton*, 48 Barb., 591; see *Dean v. Dean*, 48 Verm., 337.

Or the taking of title to land in the

name of a wife. *Bent v. Bent*, 44 Verm., 555.

But the deposit of money to the credit of children is not, if the subsequent dealings show no gift was intended. *Geary v. Page*, 9 Bosw., 290; *Caton v. Rideout*, 1 Mac Naghten and Gordon, 599.

Stocks and funds standing in the name of husband and wife survive to the wife. *Lanny v. Lanny*, Mac Naghten's Select Cases, 134 marg. p., *Dummer v. Pitcher*, Coop. Rep., Temp. Brougham, 257.

V.-C.M., June 28, 1872.

**In re MILLNER'S ESTATE.*

[245]

[Law Reports, 14 Equity Cases. 245.]

Payment out of Court—Married Woman aged Forty-nine—Presumption against having Children by an existing Husband.

The presumption that a woman aged forty-nine years and nine months, who had been long married to a husband still living and had never had any children, would not have any by him, acted upon.

PETITION. Samuel Millner, by his will, devised certain freehold property to trustees on trust for Charlotte Whitmarsh for life, and after her death for such of her children as should attain the age of twenty-one years. Eliza Whitmarsh, one of the children, on her marriage with Frederick Miles in 1846, settled her share of the estate upon trust, after successive life estates to herself and her husband, for the children of the marriage who should attain twenty-one, and in default of children of the marriage for herself, her heirs and assigns, for ever.

The Westminster Improvement Commissioners in 1847 took a portion of the estate under the provisions of the Lands Clauses Consolidation Act, and paid into Court the proportion of the purchase money representing the share of Mrs. Miles. She was born on the 30th of September, 1822, and was consequently now aged forty-nine years and nine months. She was married to her present husband on the 14th of May, 1846, and had never had any children.

The petition was by the tenant for life and Mr. and Mrs. Miles, and prayed that the money might be paid out to them on their joint receipt.

Mr. *Davey*, for the petitioners :

The only contingent interests are those of the children of the marriage of Mr. and Mrs. Miles, and it may now be safely assumed that there will not be any. The presumption is, not that a woman nearly fifty years of age is past child bearing, but that where a marriage has continued for twenty-six years, and there have never been any children, and the wife has attained that age, there will not *be any. One of the latest authorities, [246 *In re Widow's Trusts* (1), carries the simple presumption against child bearing nearly as far as this case.

SIR R. MALINS, V.C. :

I think that the presumption is on the whole so strong that the order may be made.

Solicitors: Messrs. *Syms & Son*.

(1) Law Rep., 11 Eq., 406.

V.-C.M., July 2, 1872.

ADAMS v. ADAMS.

[Law Reports, 14 Equity Cases, 246.]

1871 A., 11.

Construction of Will—Death of Original Legatee before Date of Will—Substitutionary Gift to Children.

A testator bequeathed to his sister Susan all the property he might die possessed of for life, and after her decease he desired the property to be equally divided among his brothers and sisters, and should any of his brothers or sisters die (leaving issue) during the lifetime of his sister Susan, the share which would have been theirs to be equally divided among their children:

Held, that the children of a brother who died fifteen years before the date of the will were entitled to take the share of their deceased parent.

In re Potter's Trust (¹) followed.

JOSEPH ADAMS, by his will, dated the 17th of November, 1864, gave and bequeathed to his sister, Susan Adams, all and every thing of which he might die possessed, whether in land or houses, government funds or securities, money in the bank or in his own possession, or property of any description whatever, the same to be for her sole use and benefit during her life, and after her decease he desired the said property to be equally divided among his brothers and sisters, and continued — “Should any of my brothers or sisters die (leaving issue) during the lifetime of my sister Susan Adams, the share which would have been theirs is to be equally divided among their children.”

The suit was instituted for the administration of the testator's 247] *estate, for sale and partition, and that the rights of the parties might be declared.

The testator died on the 5th of January, 1865, leaving three brothers and two sisters surviving him. He had had another brother, John Adams, who died in September, 1849, leaving six children, who had all attained twenty-one; Susan Adams, the tenant for life, died in November, 1870. A question was now raised upon further consideration whether the children of John Adams, who died fifteen years before the date of the will, were entitled to a share of the estate.

Mr. Pearson, Q.C., and Mr. Everitt, for the plaintiff, Richard Adams, the executor:

The only question now raised in this suit is, whether the children of John Adams, the brother who died before the date of the testator's will, are entitled to a share of his property; we submit that this case is governed by *In re Potter's Trust* (¹). There the bequest was to the nephews and nieces of the testator, and in case of the death of any of his said nephews and nieces leaving issue he directed that such issue should take the share that his,

(¹) Law Rep., 8 Eq., 52

her, or their parent would have taken if living, and your Honor held that the children of nephews and nieces who died before the date of the will took by substitution the shares which their respective parents would have taken if living at the testator's death. It is impossible to see any distinction between these cases.

Mr. *Bovill*, Q.C., and Mr. *Eyre*, for the brothers and sisters living at the testator's death :

The brother of the testator whose children are now claiming died fifteen years before the testator made his will ; it is impossible, therefore, that he could have had any intention of including them under the words used in this will, and unless the words are in all respects the same as in *In re Potter's Trust* the Court would not be inclined to carry out a principle which goes far beyond other cases. In *In re Potter's Trust* the words were "in case of the death of my nephews and nieces leaving issue." Here the words are, "should any of my brothers or sisters die leaving issue *during the life of my sister Susan." In this [248 case, therefore, a time is specified, but there was no time fixed in *In re Potter's Trust* (1). The decision of *In re Potter's Trust* has on several occasions been discussed by other Judges, and your Honor's observations upon *Christopherson v. Naylor* (2) have been brought to their attention, and it is right to say that they have not always been acquiesced in. In *Habergham v. Ridehalgh* (3) Vice-Chancellor *James* held that the children of a legatee who was dead at the date of the will could not take ; so also in *In re Hotchkiss' Trusts* (4) Vice-Chancellor *James* decided that children of a legatee who died before the date of the will could not participate. It is true that in *Gowling v. Thompson* (5) the present Lord Chancellor, when Vice-Chancellor, gave a fund to the issue of three brothers and a sister of the testator, who had died before the date of the will ; but the circumstances of that case were very peculiar, because the testator there gave his property to all and every his brothers and sisters and their issue, he having two sisters but no brother alive when he made his will, and the gift to issue was therefore original and not substitutionary. That decision, however, was followed with the greatest hesitation by Vice-Chancellor *Bacon* in *Barnaby v. Tassell* (6). But the decision in *In re Potter's Trust* was thought particularly unsatisfactory by the Master of the Rolls in *Ireland*, as reported in the case of *Atkinson v. Atkinson* (7), where a testatrix having a power of appointment over a fund, bequeathed all her money under

(1) Law Rep., 8 Eq. 52.

(2) 1 Mer., 320.

(3) Law Rep., 9 Eq., 395.

(4) Ibid. 8 Eq., 643.

(5) Law Rep., 11 Eq., 366, n.

(6) Ibid. 363.

(7) 6 Ir. Rep. Eq., 184.

settlement to be divided, share and share alike, between her nephews and nieces, the children of those who might be deceased to be entitled to the share of their parent. The Master of the Rolls held that the children of a nephew who was dead at the date of the will were not entitled to a share of the fund; and discussed *Christopherson v. Naylor* and *Loring v. Thomas* ⁽¹⁾; but in commenting upon your Honor's observations in *In re Potter's Trust* he was of opinion that the case of *Christopherson v. Naylor* had not been overruled, and that the principles of that case and of *Loring v. Thomas* were altogether different; that [249] **Christopherson v. Naylor* ⁽²⁾ decided that where there was a gift to a class, the gift, in the absence of express description, must be supposed to include only living objects; and that a gift by way of substitution of the share of members of the class who were dead at the date of the will must fail; but that where language is used by the testator which shows his intention, though apparently dealing with living objects, that the children of members of the class who were dead should take the share which their parents would have taken if living, then the children take as substantive legatees by way of original gift. That, he said, was the principle on which *Loring v. Thomas* ⁽³⁾ was decided; and the two cases could, consistently with every principle of true construction, stand side by side.

[They also cited *Coulthurst v. Carter* ⁽⁵⁾.]

Mr. Glasse, Q.C., and Mr. E. Ford, for other defendants.

SIR R. MALINS, V.C.:

I must admit that this case tries the principle in *In re Potter's Trust* ⁽⁴⁾ very severely, on account of the length of time between the death of the testator's brother and the date of the will. Suppose John Adams had lived till November, 1865, and had died the day before the death of the testator, who might not have heard of his death, what sort of justice would that rule have administered which would have excluded his children from the benefits given by the will, when the testator must evidently have intended to include them? There are many cases in which that occurrence might take place without the knowledge of the testator, as, for instance, when the legatee dies abroad, or dies on his voyage home. I cannot see the difference which depends merely upon the actual period of death, and I see the great advantage of the principle laid down in *In re Potter's Trust* as a general rule of application, and I think in the great majority of cases justice is more effectually done by such a rule. I cannot distinguish this case from that of *In re Potter's Trust*, and I

⁽¹⁾ 1 Mer., 820.

⁽²⁾ 1 Dr. & Sm., 497.

⁽³⁾ 15 Beav., 421.

⁽⁴⁾ Law Rep., 8 Eq., 53.

cannot see why the children of John Adams should be excluded from the benefits given by the will. I am sorry to find there is so much difference of opinion about this question. It is [250 evident that in the case of *Atkinson v. Atkinson* ⁽¹⁾ the Master of the Rolls in Ireland expressed dissent from the principle I laid down, and so also did Lord Justice James, when Vice-Chancellor, in *Hotchkiss' Trusts* ⁽²⁾, and they seemed to think that the case of *Christopherson v. Naylor* ⁽³⁾ had never before been questioned, notwithstanding that it had been treated as a case of no authority at the present day by Vice-Chancellor Stuart in *Parsons v. Gulliford* ⁽⁴⁾, and by the present Lord Chancellor, when Vice-Chancellor, in the case of *Gowling v. Thompson* ⁽⁵⁾. I am satisfied that the rule laid down in *Christopherson v. Naylor* has worked great injustice in a number of cases. I have repeatedly had the question raised and argued before me since I decided *In re Potter's Trust* ⁽⁶⁾, but I have invariably adhered to the principle I there laid down. I decided that case after very much consideration, and being convinced that it is one which is calculated to give effect to the intention of testators, and to carry out substantial justice, I shall continue to act upon it until my decision is reversed by a higher tribunal. I should certainly be glad if the parties would take this case before the Court of Appeal, in order that the question may be set at rest one way or the other, and, considering the opinion entertained by Lord Justice James, it is not unlikely that my decision may be reversed, together with the decisions of the two Vice-Chancellors who preceded me in entertaining the same opinion; but as long as it stands unreversed I shall continue to act upon it. I must, therefore, declare that the children of John Adams are entitled to share in the estate.

Solicitor for the plaintiff: Mr. F. Morgan.

Solicitors for the defendants: Messrs. Bartley & Saxton.

⁽¹⁾ 6 Ir. Rep. Eq., 184.

⁽²⁾ Law Rep., 8 Eq., 648.

⁽³⁾ 1 Mer., 820.

⁽⁴⁾ 10 Jur. (N.S.), 281.

⁽⁵⁾ Law Rep., 11 Eq., 366, n.

⁽⁶⁾ Ibid., 8 Eq., 53.

*DEWITTE v. PALIN.

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V.-C.M. July 5, 1872.

[Law Reports 14 Equity cases 251.]

1872 D. 104.

Infants — Reversionary Interest — Scheme for Maintenance.

The court has jurisdiction to charge reversionary property of infants with money required for their maintenance, even where some of the infants for whose benefit the money is raised may not ultimately become entitled in possession to the property charged. A security for this purpose approved, with a provision for restoring the money by means of an insurance against the contingency.

PETITION. John Freeman, by his will, dated the 8th of October, 1849, devised his real estate to his daughter, Elizabeth Frances Freeman, for life, with remainders, subject to a power given her to appoint a life interest to a husband, to her sons in succession in strict settlement, with remainder to the use of all and every her daughters and daughter in equal shares as tenants in common; and he gave his residuary personalty to trustees upon trust for his daughter for life for her separate use, without power of anticipation, and subject to a power to appoint a life interest to a husband, upon trust for the children of the daughter as she should, either alone or during any marriage jointly with her husband, appoint, and in default of appointment upon trust for her sons as therein mentioned, and if she had no son, in trust for such of her daughters as should attain the age of twenty-one years; if more than one, in equal shares as tenants in common.

The testator died in the year 1853, leaving both real and personal estate. His said daughter, on the 21st of November, 1854, married Gerard De Witte, having previously attained twenty-one.

By will dated the 5th of February, 1855, Mrs. De Witte appointed a life interest in the property to her husband, and by a deed poll dated the 22d of April, 1868, she and her husband jointly appointed the real and personal estate of the testator upon trust for all and every her daughter and daughters who should be living at her decease, to be equally divided between them, share and share alike; and she directed that in case of any of 252] her *daughters dying under twenty-one, and without having been married, the share or shares of her or them so dying should accrue to the survivors or survivor.

Mrs. De Wittte died on the 24th of May, 1868. Her only children were the petitioners, her four infant daughters, the eldest of whom was born on the 4th of March, 1856. Mr. De Witte had lost or disposed of the whole of his life interest in the property, and the only mode of providing for the maintenance and education of the infants was by charging in some way or other their reversionary interest.

The petition set out an opinion given by Mr. Sprague, an actuary, as to the best mode of effecting this object. He proposed that, with the sanction of the Court, an application should be made to some insurance company to advance a sum of £600 a year (which was considered to be a suitable amount) in addition to the premium on an insurance against the event of none of the daughters attaining the age of twenty-one, which he estimated at a single payment of £210, on condition that such advance were allowed to accumulate at compound interest. This scheme would consequently come to an end as soon as one of the daughters attained twenty-one.

The petition asked that this scheme might be carried into effect, or that some other scheme might be sanctioned by the Court.

Mr. *Glassey*, Q.C., and Mr. *Charles Hall*, for the petitioners:

There would be no difficulty in the Court sanctioning a charge upon capital in possession, and there does not seem to be any more difficulty with regard to charging prospective interest.

Mr. *Seomberg*, Q.C., as *amicus curiæ*, mentioned that the Master of the Rolls had on one occasion made an order on a similar petition.

SIR R. MALINS, V.C.:

I recollect a case when I was at the Bar, of *Ring v. Jarman*, where there was a gift of a reversion of real estate which might never take effect, and Vice-Chancellor Stuart authorized a present *advance of £6000 to the reversioner. The matter was op- [253 posed and went before the Lords Justices, who affirmed the decision of the Court below. This petition simply asks to raise a sufficient sum to provide £600 a year. It is a clear case. The order will be to approve of the scheme generally, and refer it to Chambers to carry it out. In *Ring v. Jarman* the money was actually paid out of the property, its restoration being secured by a policy on the life of the infant for whose benefit the advance was made.

Solicitors: Messrs. *Emmets, Watson & Emmet*.

See 1 Eng. Rep., 426, note.

Where a father who was not of ability to maintain his daughter had, as her guardian, received the rents of her property, but had maintained her during her infancy, and until her marriage, and had spent a considerable sum in the costs of a suit relating to her property, which ended beneficially for her, but of which her estate had to bear the costs: *Held*, that he was, under the circumstances of the case, entitled to retain the rents so received, by way of allowance for her education, and his expenditure on her behalf. *Wright v. Verplank*, 8 DeGex, MacNaghten and Gordon, 133.

In North Carolina, it has been held that a father if he has the ability is bound to support his children, and is not entitled to credit for their support in a settlement of his accounts. *Haglar v. McCombs*, 66 N. C., 345.

In Mississippi, it has been held that a probate court may fix the amount to be expended for the maintenance and education of an infant, and to say how far the principal shall be encroached upon, but that if a guardian without

such an order exceeds the income of his ward's estate, he does so at his peril. *Wiggle v. Owen*, 45 Miss., 691.

In *Edwards v. Abrey*, 2 Cooper, Temp. Cottenham, 177, the court refused to allow a sale of any portion of a lunatic wife's estate to repay the husband for her past maintenance, on account of his inability to support her. The chancellor however ordered that the amount reported by the master be allowed the husband for her future maintenance out of her separate income, he not being of ability to maintain her, and allowed him to receive part of the income of her separate property, which was not required for her maintenance, until money advanced by him for her past maintenance was repaid. The master reported that the husband should give surety properly to apply the sum allowed for the maintenance of the wife, but the court held this to be unnecessary. In the case of *Perse*, a lunatic, (3 Molloy, 94), the Lord Chancellor of Ireland (Hart), held that the maintenance of lunatics is not limited, like infants, to the amount of the income of their estate.

GIACOMETTI v. PRODGERS.

V.-C.M., July 10, 1872.

[Law Reports, 14 Equity Cases, 253.]

[1871 G. 51.]

Wife's Equity to a Settlement — Sufficient Maintenance — Marital Rights.

The plaintiff filed a bill to establish her equity to a settlement of £6000, which accrued to her absolutely during her coverture. The husband, on the marriage, which took place in 1862, gave up an income of £400 a year at the desire of his wife, but he had no property and made no settlement. Subsequently to the marriage sums amounting to £56,000 consols were settled by the wife's mother and relatives upon her for life for her separate use, with remainder as to £200 a year for her husband for life, and subject thereto for the children. From 1862, she allowed her husband £100 a year till 1865, when he left her, and they had not since resided together. In 1870, the wife agreed, under pressure of a suit by the husband for restitution of conjugal rights, to allow him £300 per annum. She had saved out of her income £1000 a year for six years. There were two children, who were supported by the wife:

Held, that the wife being amply provided for, and there being no proof of misconduct on the part of the husband, the Court would not interfere with his marital rights, and bill dismissed with costs.

THIS was a bill filed by Caroline Giacometti, wife of Giovanni Giacometti, for a declaration that she was entitled, for the benefit of herself and her children, to an equity to a settlement of a sum of £6000, to which she had become entitled absolutely under the administration of the personal estate and effects of her aunt, Laura Blades. The plaintiff was married in London, on the 15th of February, 1862, to the defendant, Giacometti, a native 254] of Austria, *who was then a captain in the Austrian navy. At the time of his marriage he gave up, at the request of the plaintiff, an appointment in one of the Austrian Lloyds' ships which amounted to about £400 per annum, and had then little or no means of his own. At first the plaintiff and her husband were supported by the plaintiffs' mother, and no settlement was made before the marriage, but on the 9th of December, 1862, the plaintiff's mother executed a voluntary deed whereby she settled certain moneys on the plaintiff for life, to her separate use, without power of anticipation, with remainder as to £200 per annum on the defendant, G. Giacometti, for life, and, subject thereto, with remainder as to the whole of such moneys on the children of the marriage. On the 22d of December, 1862, the mother executed another deed poll, whereby she appointed the interest and produce of a further sum of money to be paid to the plaintiff for her separate use for life. Other moneys were also given by relatives, and the result was that the wife had for her separate use the income of £56,000 consols, the husband having under the settlements only the reversionary life interest of £200 a year.

The plaintiff did not allow her husband to exercise any con-

trol over her separate property, but until the year 1865 she allowed him a yearly sum of £100.

Soon after the marriage differences arose between the parties, and they lived together unhappily till 1865, when the husband left his wife and went abroad, and they had never resided together since that period. There were two children of the marriage, one ten and the other eight years of age.

In March, 1870, in consequence of doubts having arisen in the plaintiff's mind whether her marriage was valid, she commenced a suit in the Divorce Court, praying that her two children might be declared to be the legitimate issue of herself and the defendant, and an order was made in accordance with the prayer.

The defendant, G. Giacometti, had never in any way assisted in the support or maintenance of the plaintiff or of her children, nor had he ever settled any property upon them, but they had been always supported entirely by the plaintiff.

The defendant had lately instituted a suit in the Divorce Court against the plaintiff for restitution of conjugal rights. The plaintiff *did not appear by counsel, and a decree was [255 made against her, when the plaintiff, to avoid compliance with such decree, assented to an agreement, which was carried out by a deed dated the 9th of February, 1871, whereby the plaintiff covenanted to pay to the defendant an annuity of £300 during her life, and after her death an annuity of £100, and that she would provide for her own maintenance and the maintenance and education of her children so long as they should be left under her sole control, and that she would indemnify the defendant against all demands that should be made against him in respect of her debts, liabilities, and engagements. And the defendant covenanted that he would not take any proceedings for compelling the plaintiff to live with him, and would not molest or interfere with her. By that agreement it was further provided, that nothing therein contained should affect any right of the defendant in respect of the money which had devolved upon the plaintiff as one of the next of kin of Laura Blades, or any other property to which she might thereafter become entitled.

The plaintiff had saved out of her separate estate about £6000, which she charged with the payment of the annuity to the defendant.

Allegations of misconduct and ill-treatment were made by the plaintiff against the defendant; but most of these allegations were struck out of the bill when amended.

The defendant, on the other hand, denied having been in any way unkind to the plaintiff, and alleged that it was entirely

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Giacometti v. Prodgers.

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through her own strange and unaccountable conduct that they had been unable to live together. These statements were confirmed by the evidence of the plaintiff's two brothers, who were on friendly terms with the defendant, and had on various occasions befriended and assisted the defendant in the difficult position in which he had been placed by the conduct of the plaintiff.

Mr. Karlake, Q.C., and Mr. Willis, for the plaintiff:

This is a case for the discretion of the Court, and we submit that the wife is entitled to have the whole fund settled upon herself and her children,

The authorities upon the subject are collected in Macqueen's 256] *Law of Husband and Wife (1). In *Dunkley v. Dunkley* (2) the Court, under the circumstances of the case, directed the whole of a fund devolving upon the wife to be settled for the benefit of her and her children. In *Green v. Otte* (3) it was said to be usual for the Court to have regard to any settlement made upon the wife *aliunde* by the husband. Here there was none. In *Gardner v. Marshall* (4) reference was made to the large amount of property the husband had received from his wife, and the whole fund was there settled upon her and her children. In *Gilchrist v. Cator* (5) the whole fund was given to the wife; and so it was in *Scott v. Spashett* (6). These cases show that it has been the custom, where the circumstances justify it, for the Court to give the entire fund to the wife. The Court sits as arbitrator, and has a discretion either to give the whole or a part to the wife. In *Vaughan v. Buck* (7) only two-thirds of the dividends of a fund were given to the wife; but, under the special circumstances of this case, the Court can do no other-wise than order the whole fund to be settled upon the wife and children.

Mr. Glasse, Q.C., and Mr. Shebbeare, for the defendant:

The husband's legal right is to have the whole fund, but there are, no doubt, authorities where, under special circumstances, a portion, and sometimes the whole, has been given to the wife. The only ground for the interference of the Court to deprive the husband of his marital right is the poverty of the wife and her necessity for a sufficiency to support herself. It is true that M. Giacometti made no settlement upon his wife, but he had an income of £400 per annum when he married, with a fair prospect of rising in his profession and obtaining a much larger income. All this he gave up, at the request of his wife, upon the marriage. She allowed him no more than £100 for pocket-

(1) Ed., 1872, p. 72.

(2) 2 D. M. & G., 390.

(3) 1 S. & S., 250.

(4) 14 Sim., 575.

(5) 1 De G. & Sm., 188.

(6) 3 Mac. & G., 599.

(7) 1 Sim. (N.S.), 284.

money. It was only under pressure that the plaintiff consented to settle £300 per annum upon him; but this is only a very small portion of her property, as she has no less than £56,000, all invested in *the government funds, producing an in- [257 come of £2000 per annum. That this is a most ample income is sufficiently proved by the fact that she has managed to save £1000 a year. There is no misconduct on the part of the husband. And even where there is a separation the Court has given the property to the husband, as in the case of *In re Erskine's Trusts* ⁽¹⁾; no blame was there attached to either party, and the separation took place by mutual consent. *Spicer v. Spicer* ⁽²⁾ was even a stronger case, for it could not be said that the husband was free from blame, and yet the Court directed that the whole of the accruing fund should be paid to the husband. In *Aguilar v. Aguilar* ⁽³⁾ it was held that where a wife has an adequate settlement she is not entitled to any further portion of an accruing fund which the husband takes *jure maritæ*, except in cases of desertion or insolvency; and in *Aubrey v. Brown* ⁽⁴⁾, where the husband has grossly misconducted himself, and where the wife had an income of only £260, still the Court gave the husband's assignees £250 out of a fund of £1150 to which the wife became entitled.

Mr. Karlake, in reply.

SIR R. MALINS, V.C.:

This is a bill filed by Mrs. Caroline Giacometti, for the purpose of asserting her right to a settlement of a sum of about £6000, to which she has become absolutely entitled in possession during her coverture. At the time of the marriage between the plaintiff and G. Giacometti, in February, 1862, the lady having nothing to settle, no marriage settlement was executed. They lived together in a very unhappy manner till the year 1865, when it appears the conduct of this lady had become utterly intolerable to her husband, and I have no doubt whatever upon the evidence that he was absolutely obliged, if he expected ever to have an hour's comfort, to leave her, which he did.

Up to this time, which was nearly three years after the marriage, the purse strings seem to have remained with the lady. During the coverture, there had been settled by the lady's mother *and given by relatives no less a sum than £56,000 [258 consols, which became settled on the lady for her separate use, independent of her husband, producing a sum of about £2000 a year. But, notwithstanding her ample means, it never seems to have entered her mind that her husband was to participate in

⁽¹⁾ 1 K. & J., 302.

⁽²⁾ 24 Beav., 365.

⁽³⁾ 5 Madd., 414.

⁽⁴⁾ 2 Jur. (N.S.), 879.

the enjoyment of their income, and she only allowed him a small pittance of £100 per annum, by way of pocket money. From the year 1865 to 1872, she continued to enjoy the whole of her property, and her means were so ample that she managed to amass a sum of between £6000 and £7000, or at least £1000 a year, during the absence of her husband. He has directly sworn, and I have no reason to doubt the accuracy of his statement, that at her request, and at her instance only, he gave up his occupation as an officer in the Austrian navy, and was left without any means of existence.

In that state of things he instituted a suit in the Divorce Court for the restitution of conjugal rights, and though this lady could have had no difficulty in obtaining legal advice, she allowed the decree to be obtained by default on the 19th of December, 1870. There are two children of this marriage, aged respectively ten and eight years, and previously to the suit instituted in the Divorce Court by her husband this lady took proceedings in that Court, nominally to obtain a declaration of the legitimacy of her children, about which there could be no doubt, but from all that is stated of her strange opinions, the object of the suit must have been substantially to obtain a declaration of their illegitimacy, and that she was the mother of two bastard children. In order to avoid the consequences of the decree against her in the suit by her husband, the plaintiff was induced to come to an arrangement, which was carried out by a deed dated the 9th of February, 1871, by which she secured to the husband an income of £300 a year during his life, and he in his turn agreed by that deed not to molest her. It is in fact a separation deed.

It was in the latter part of the year 1870 that the plaintiff became entitled to the £6000 to which she now asserts her equity for a settlement.

In order to arrive at a conclusion in such a case, it is necessary to have regard to what the doctrines of the Court are 259] as to the *right of the wife to an equitable settlement. The principle is peculiar to the laws of England, and it proceeds upon this foundation. By the marriage the husband acquires the absolute right to all the personal property of the wife. But this Court allows the wife in a proper case to claim a settlement out of moneys accruing to her during the coverture. This property accrued to the wife during her coverture, and it is property, therefore, as to which she would be entitled to ask the Court to make a settlement upon her if the circumstances were such as to call for the interference of the Court.

Now what are the circumstances which call for the interference of the Court? I have always understood that the basis

upon which the Court interferes with or intercepts the absolute right of the husband to take possession of the property which the wife has acquired during her coverture, is where it is shown that the wife requires the provision which she asks the Court to make. Unless it is founded upon her poverty, that is to say, that she is not already provided with an income adequate to maintain her in her position in life, I apprehend that her right to a settlement falls to the ground. For example, suppose a case is brought before the Court where it is plain that the income of the wife is more than double what is sufficient to answer all her wants, and a sum of £10,000 accrues to her, the husband becomes bankrupt, and the question is between the wife and her husband's creditors, would any Court think of deciding that the wife was entitled to an equitable settlement when it was shown that her wants were amply supplied? So in this case the lady, in my opinion, is bound to show that, independently of the property which she desires to have settled upon her, she is not amply provided for. If she is amply provided for, then I take it to be clear, upon the principles of the Court, as well as the decision of Vice-Chancellor Wood in *In re Erskine's Trusts* ⁽¹⁾, and of the Master of the Rolls in the case of *Spicer v. Spicer* ⁽²⁾, that she would not be entitled to a settlement. The principle is also particularly laid down by Sir John Leach in *Aguilar v. Aguilar* ⁽³⁾, where he says, "If he failed in his obligation to maintain the wife, either by the *deser- [260] tion of his wife or by his inability to assist in her support, this Court would fasten that obligation upon the property itself; but that principle would not apply where the wife had secured to her a competent separate maintenance." Now, has this lady secured to her a competent separate maintenance? She has been living apart from her husband for more than seven years. What is the sum she has for maintenance? It is admitted that before she gave her husband £300 a year, she had an income of fully £2,000, and she has now, after paying her husband £300, a sum of £1700 a year. Is that a competency? Looking at her station in life, she being a lady in the middle class of life, with two children, who can, for one moment, hesitate in coming to the conclusion that for such a lady £1700 a year, although she has these two boys to educate, is an ample provision? Then, if we look at the result, what does it show? From the year 1865 to the year 1872 she has saved £1000 a year. Can I have better evidence than that to show that the provision which she has is ample? What possible ground, therefore, is there to interfere with the right of the husband? The gentleman has conducted himself with the greatest propriety. I say that with

⁽¹⁾ 1 K. & J., 802.⁽²⁾ 24 Beav., 365.⁽³⁾ 5 Madd., 414.

every confidence, because not a single member of the lady's family has sided with her. The trustee, the Rev. Edwin Prodgers, writes in 1865, in these terms: "Dear Giacometti, I wish I could do more to alleviate your unhappy state; but we must, as you most properly say, rely upon an allwise and good God to support you under all your trials. One thing you are convinced of, that you can never expect to live happily for any time with your wife, so I can only recommend a change of residence and occasional visits to show you do not wish to be guilty of desertion." I think this gentleman, Mr. Prodgers, if he had any reason to alter his opinion of Mr. Giacometti in the interval, would hardly have written as he did on the 17th of February, 1871, after the execution of the deed I have referred to:—"My Dear Giacometti, I write to you to say how glad I am to feel that at last my sister has consented to an arrangement which will give you an independent income for life. You are aware how much I have felt for you during the years you have been sorely tried, convinced that it was always your anxious wish to endeavor to study altogether the comfort and happiness of your 261] wife and *your conduct, since I had the pleasure of making your acquaintance, has always been so upright and honorable as to make it a pleasure to befriend you."

What other conclusion therefore can I come to upon the evidence before me than that this separation which has taken place is not to be attributed to any fault on the part of Mr. Giacometti, who I am satisfied behaved as a kind husband to this lady, but has been produced by some extraordinary state of mind on her part? I must therefore conclude that the separation is not in the slightest degree attributable to him, but wholly to her. The only thing alleged against him is that on some occasion, under great irritation, he used strong language. What that strong language was I have no intimation: but I am bound to say that if anything could have produced strong language on the part of any man, it was the course of irritation to which this gentleman was exposed for so many years.

Therefore, under all the circumstances of the case, I find no reason to deprive the husband of his right. The claim on the part of the lady, in my opinion, wholly fails; and in order to mark my disapprobation of the spirit of this litigation, and the charges which have been made by the lady against her husband, I dismiss the bill with costs.

Solicitor for the plaintiff: Dr. Zimmerman.

Solicitors for the defendant: Messrs. Gray, Johnston, & Mounsey.

V. C. M. July 10, 1872.

*RAYNER v. KOEHLER.

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[Law Reports, 14 Equity Cases, 262.]

1872 R., 52.

Administration — Plea that Defendant was not Administratrix.

A bill by a creditor to administer the estate of a testator alleged that the testator by his will gave to his wife, the defendant, the use for her life of half his estate, and appointed her guardian of his children; that administration with the will annexed had been granted to the defendant, who was "the only legal personal representative and also heir of the undisposed of moveables and immoveables," and that she had received and entered into possession of all the real and personal estate of the deceased:

Plea, that the defendant was not, nor had ever been, administratrix with will annexed or legal personal representative of the deceased:

Held, that if the defendant was not administratrix, she was executrix *de son tort*, and the bill could be sustained. Plea ordered to stand for an answer, with liberty to except.

THIS was a plea to a bill filed by Ellen Rayner, on behalf of herself and other creditors of Lewis Koehler, against Louisa Micheline Koehler.

The bill stated that in April, 1868, the plaintiff obtained a judgment in the Court of Exchequer against Lewis Koehler for £18 2s. 6d. debt and £79 15s. 6d. costs. That Lewis Koehler, by his will dated the 12th of March, 1865, gave and bequeathed to his wife, the defendant, Louisa M. Koehler, the usufruct for her life of half of his moveable and immoveable estate which he should have at his death, and he appointed the defendant to be the chief guardian of his children under age. That Lewis Koehler died in November, 1871, and administration with the will annexed of his estate and effects had been granted to the defendant, who now was "the only legal personal representative and also heir of the undisposed of moveables and immoveables of Lewis Koehler," and that the defendant had received and entered into the possession and enjoyment of all the real and personal estates and effects of the said Lewis Koehler, deceased.

The bill prayed that the amount owing to the plaintiff on the aforesaid judgment, together with interest thereon, might be paid to the plaintiff, or that in default the personal and real estate of *Lewis Koehler might be administered by the [263 Court, and that the real estate might be sold and a receiver appointed.

A plea was put in by the defendant that she was not, nor had ever been, administratrix with will annexed or legal personal representative of the deceased person in the bill called Lewis Koehler, the supposed testator in the bill mentioned.

Mr. Cotton, Q.C., and Mr. Osler, in support of the plea:

This bill states that the defendant is administratrix of Lewis

Koehler, and that she is the only legal personal representative and also the heir of the undisposed of property of the deceased. It also states that she has received and taken possession of the estate and effects. The plea is, that she is not administratrix or legal personal representative of the deceased. There is ample authority to show that this is a good plea. In the case of *Cooke v. Gittings* ⁽¹⁾ there was a bill of revivor against A B, and it alleged that a defendant to the original bill had died, having by his will appointed A B executrix, and that she had taken on herself the execution of the will, and had possessed the assets and taken on herself the administration thereof. A plea that A B was not executrix was allowed. The allegation that the defendant has taken out administration is inserted in the bill for the sole purpose of preventing its being demurrable. The test of a plea is, that if the matter pleaded to were struck out of the bill it would be demurrable. A bill filed against a person before administration is granted is demurrable for want of parties if it prays on account of the estate: *Rawlings v. Lambert* ⁽²⁾; and it was held in *Penny v. Watts* ⁽³⁾ that an allegation that the defendant, being the person entitled to take out representation to a deceased party, refused to apply for it, and impeded the plaintiff in procuring a grant of it to any other person, was not a sufficient answer to a demurrer founded on the absence of such representative. It is not necessary to deny possession of the assets, for if that were stated in the plea it would make it double and informal. If this were a suit against the defendant as executrix *de son tort*, the legal personal representative would be a necessary party: *Creasor v. *Robinson* ⁽⁴⁾. The plea is sufficient; if true, it is a complete answer to the bill ⁽⁵⁾. In *Hill v. Neale* ⁽⁶⁾ a creditor of a testator filed a bill against A, stating that he was the executor, and had proved the will, and that whether he had proved the will or not he had possessed himself of the personal estate of the testator, and praying an account. A plea that A was not executor was held to be a good plea to the whole bill.

Mr. Glasse, Q.C., and Mr. Hemings, for the bill:

It seems to have been forgotten that it is a man who is not named in the will who is an executor *de son tort*: *Carmichael v. Carmichael* ⁽⁷⁾. Here the defendant is alleged to have taken out administration and to have possessed herself of the assets. It is not necessary to allege that she is executrix *de son tort*, but it is sufficient to allege the facts which show it. There is no answer to the allegation as to the testator's will, or to the statement that

⁽¹⁾ 21 Beav., 497.

⁽²⁾ 1 J. & H., 458.

⁽³⁾ 2 Ph., 149.

⁽⁴⁾ 14 Beav., 589.

⁽⁵⁾ Mit. Pl., 5th Ed., 270, n.

⁽⁶⁾ 5 L. J., 144.

⁽⁷⁾ 2 Ph., 101.

the defendant has taken on herself the execution of the will and has possessed herself of the assets. If that be true, she is executrix *de son tort*, and accountable accordingly. If executors elect to act, they are liable to be sued before probate, and cannot afterwards renounce: *Blewitt v. Blewitt* ⁽¹⁾. If it were necessary to allege that the defendant was executrix *de son tort*, the bill could be amended, and the Court would not allow a charge of this nature to be got rid of by a simple plea that the defendant is not executrix. The cases cited were chiefly cases on demurrer.

In *Tempest v. Lord Cumoy*s ⁽²⁾, where a bill was filed for the administration of real and personal estate, a plea in bar by the alleged executors, that they had been prevented proving by the plaintiff's entering a caveat in the Court of probate, was overruled, and the plea was ordered to stand for an answer, with liberty to except; and in *Vickers v. Bell* ⁽³⁾ an executor who had not proved the will was held to be a proper party to an administration suit, provided that he had acted as executor, though he might not have received anything as such.

*Counsel for the bill were stopped by the Court.

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Mr. Cotton in reply:

The bill alleges that the defendant is tenant for life of the real estate. There could be no demurrer to that. It is a bill to administer the real as well as the personal estate, having before the Court only the tenant for life, and not having any personal representative. Such a bill cannot be sustained, and the only proper way of meeting it is by a plea. There is no allegation that the defendant is executrix *de son tort*.

[The VICE CHANCELLOR: But the plea admits what is equivalent to that.]

Vickers v. Bell ⁽³⁾ decides in effect that a decree cannot be made against a person unless he has acted as administrator. This bill states that the defendant is personal representative; the plea says she is not, and a bill which is filed for administration without a personal representative is demurrable. By this plea we strike out of the bill the only thing which prevents it from being demurrable.

SIR R. MALINS, V.C.:

On the face of this bill, if the allegations are true, and upon this plea they must be taken to be true, there is nothing more certain than that the plaintiff is entitled to the decree asked. The defendant by her plea must admit all the statements in the bill except such as she denies by the plea, therefore she admits that she has received and entered into the possession and enjoy-

(1) You., 541

(2) 35 Beav., 201.

(3) 4 D. J. & S., 274.

1872.

In re Ruding's Settlement.

V.C. M.

ment of all the real and personal estate and effects of Lewis Koehler, and, consequently, she must have in her hands the only property by means of which the debt due to the plaintiff can be paid. It is clear that a person who takes possession of the property of a testator and proceeds to deal with it must be treated as an executor *de son tort* and can be sued in that character; therefore it is quite clear that if I allow the plea I must give leave to amend. The defendant states by her plea that she is not and never was the administratrix, and that she is not the 266] legal personal representative; but the bill alleges *that she has possessed herself of the estate of the testator, and therefore if she is not administratrix she is at any rate executrix *de son tort*, and in that character the bill can be sustained. I think, therefore, that the proper course will be to direct that the plea shall stand for an answer, with liberty to the plaintiff to except.

As to the cases cited, I do not find anything in them which is contrary to my view of this case. There is one part of *Cooke v. Gittings* ⁽¹⁾, as to not giving leave to amend, which I certainly could not follow, and I think the principle of my decision is supported by the case of *Vickers v. Bell* ⁽²⁾.

Solicitor for the plaintiff: Mr. J. P. Poncione.

Solicitor for the defendant: Mr. W. Eley.

V.C.M. July 16, 1872.

In re RUDING'S SETTLEMENT.

[Law Reports, 14 Equity Cases, 266.]

Settlement — Power to appoint by Will — General Bequest by Will of prior Date — Contrary Intention — Wills Act, s. 27.

By a settlement dated the 6th of January, 1858, the settlor declared that a sum of money should be held on trust as he should by deed or will appoint, and in default of appointment in trust as therein mentioned. A will made by the settlor five weeks before the settlement contained a general residuary bequest:

Held, that although a general residuary bequest would operate as an execution of a power in a subsequent settlement, still the Court had power in construing both instruments to consider the surrounding circumstances, which showed that the settlor never intended the settlement to be revoked by a prior will; and that consequently the will was not an execution of the power.

THIS was a petition for the payment out of Court of a sum of money which had been paid in under the trustees relief act.

The petitioner was the illegitimate son of Rogers Ruding, who died in August, 1856, without having made any permanent provision for the petitioner. John Clement Ruding, the brother of Rogers Ruding, promised the latter on his death bed that he would settle a sum of £1800, the amount to be received in respect of a policy of assurance on the life of Rogers Ruding, upon the

⁽¹⁾ 21 Beav., 497.

⁽²⁾ 4 D. J. & S., 274.

petitioner* and upon two other persons. Shortly after [267 the death of Rogers Ruding his brother, J. C. Ruding, informed a lady named Perette, by whom the petitioner was maintained and educated, that he had invested a sum of £600 for the benefit of the petitioner in railway preference stock, and the dividends were paid regularly to her for the petitioner during the life of J. C. Ruding.

In October, 1858, J. C. Ruding wrote to Mrs. Perette, and stated that he had executed a settlement under which the petitioner would be entitled to receive £600 when he attained twenty-one, provided he, J. C. Ruding, did not, by writing or by his will, revoke the same, which he was not likely to do if the petitioner conducted himself properly.

The settlement so referred to was dated the 6th of January, 1858, and was made between J. C. Ruding of the one part, and two persons therein named as trustees of the other part. It recited that J. C. Ruding, in consideration of love and affection for his deceased brother, and out of regard for his memory, was desirous of making some provision for the petitioner and the two other persons named therein, one of whom was an illegitimate daughter of his brother, and the third was the mother of that daughter; and it was thereby declared that he, the said J. C. Ruding, and the two trustees should stand possessed of a sum of £1800 4½ preference stock in the Caledonian Railway Company, which had been transferred into their names, and of the stocks, funds, and securities upon which such railway stock should from time to time be invested, upon trust for such person or persons, for such interest or interests, and for such intents and purposes, and under and subject to such powers and provisos as the said J. C. Ruding, by any deed or deeds, instrument or instruments in writing, with or without power of revocation and new appointment, to be sealed and delivered by him in the presence of, and attested by, one or more credible witness or witnesses, or by his last will and testament in writing, should from time to time, or at any time or times, appoint, and in default of and until any such direction or appointment as to one-third part or share thereof upon trust absolutely for the petitioner, his executors and administrators, if and when he should live to attain the age of twenty-one years, with a gift over, in the event of his dying under twenty-one, in favor of the five legitimate children of Rogers Ruding.* And the other two-thirds were to be held upon similar [268 trusts in favor of the other two persons therein named, that is, the illegitimate daughter of Rogers Ruding and her mother.

J. C. Ruding died on the 11th of May, 1860, having made and executed his will, dated the 2d of December, 1857, five

weeks before the date of the settlement, and thereby, after giving various legacies, he bequeathed the residue of all his effects and property of every description whatsoever and where-soever unto the five legitimate children of his brother Rogers Ruding, in equal shares, with benefit of survivorship among them in case any or either of them should die before J. C. Ruding.

After the decease of the testator the dividends as they became due on a third part of the said sum of £1800 railway stock were duly paid by the surviving trustees, of the settlement to Mrs. Perette for the benefit of the petitioner.

In March, 1872, the said trustees sold the £1800 railway stock, in order to pay it over in equal third parts to the three persons entitled thereto under the settlement, but they were then advised that they could not safely do so, for that the residuary bequest in the will of J. C. Ruding, though executed before the indenture of settlement, operated upon and comprised the said sum of £1800 stock.

In consequence of this advice the trustees paid the money into Court under the Trustees Relief Act, and it was now represented by the sum of £2049 4s. Bank annuities, standing in the name of the Accountant-General to the credit of this matter.

The petitioner attained the age of twenty-one in May, 1866. It appeared from the evidence that Rogers Ruding was at one time a man of good property, and J. C. Ruding was connected with him in business. From some circumstances Rogers Ruding lost his property, and had no means of providing for his two illegitimate children. By the affidavit of the lady who had nursed him in his last illness, and who was the mother of one of the children, it was stated that Rogers Ruding saw his brother, J. C. Ruding, every day, and begged him to allow his illegitimate children and their mother to have his furniture, plate, linen, books, &c., as well as the sum for which he had insured his life. This J. C. Ruding promised he would do, and 269] putting his hand *into the hand of his dying brother three times, gave him the solemn promise that nothing should induce him to do otherwise, whereupon Rogers Ruding said he should die more happy after that promise.

Mr. Cotton, Q.C., and Mr. W. Barber, in support of the petition :

In this case it is impossible to doubt what the intention of the testator was. He made his will in December, 1857, giving his residuary property to the five legitimate children of his brother, and five weeks after he had made his will he executed the settlement whereby, in pursuance of the promise made to his brother on his deathbed, he settled the sum of £1800, which was

derived from the policy upon his brother's life, upon the two illegitimate children of his brother, and the mother of one of them. The settlement was unfortunately prepared in the usual form when it is intended to give the settler a power of revocation; that is to say, in trust as the settler shall by deed or will appoint, and in default of appointment to the three persons who were to benefit by it. It cannot be supposed that this gentleman had studied the last Wills Act, so as to be aware that he had at one and the same time executed a settlement and revoked it. He could not have supposed that by a previous will he had also executed the power in the settlement he was then making, but this would be the effect of the Wills Act, which provides that a general bequest of property shall be held to include all property over which the testator has a power of appointment, and also that the will shall speak from the death of the testator. In construing a will, however, the act provides that that shall be the effect unless a contrary intention shall appear. If ever there was a contrary intention apparent, it certainly is so in this case, and the evidence makes it conclusive that the testator never intended the will to be an execution of the power. The words of the power are, that the property shall be held upon such trusts as the settler "shall" by deed or will appoint, and this must necessarily point to a future will, and not to a will already made which could not be a will which shall be made.

This question, however, is not devoid of authority. In the case of *Moss v. Harter* ⁽¹⁾ certain property was settled as the settler *should by deed or will appoint, and in default of [270] appointment to himself for life, and then to other persons. He afterwards executed an appointment by deed of part of the fund and confirmed the trusts of the settlement as to the remainder. He then made a will, and gave all his personal estate not otherwise effectually disposed of, and it was held that the settler had sufficiently expressed an intention not to affect the unappointed property comprised in the settlement. You must, for the purpose of ascertaining the intention of the testator, incorporate the will with the settlement, and then the recitals in the settlement make it manifest that the will was not intended to be an execution of the power.

Mr. *Higgins*, Q.C., and Mr. *Law*, for some of the legatees under the will, supported the view taken by the petitioner.

Mr. *Glasse*, Q.C., and Mr. *D. Jones*, for other legatees under the will, declined to argue the case against the petitioner.

Mr. *Ince*, for *Caroline Ruding* one of the *cestuis que trust* under the will.

(1) 2 Sm. & Giff., 458.

Mr. Cole, Q.C., and Mr. Shebbeare, for the trustees :

As some of the legatees under the will are abroad, and their consent cannot be obtained, we must submit, in opposition to the petition, that whatever might have been the intention of J. C. Ruding the law is clearly against the petitioner. It may possibly be a hard case, but this must not induce the Court to put a wrong construction upon the Act of Parliament, which is distinct. The 24th section of the Act (1 Vict. c. 26) makes the will speak from the death of the testator ; and the 27th section enacts that a general devise includes a power unless a contrary intention appears by the will. At the time this testator made his will he certainly intended everything he had to pass by the will, and no such contrary intention as the act requires appears upon the will itself. The Court cannot look to circumstances outside the will for the purpose of construing it, much less can it regard circumstances which took place after the date of the will to show what might have been the intention of the testator had he made his will at a subsequent period. The testator [271] might very possibly *have intended to revoke the settlement. He must be taken to have known the law which made his will an execution of the power. Instead, therefore, of executing a separate instrument he allowed his will to stand unaltered, for the purpose of effecting his intention without further trouble.

The question in *Moss v. Harter* (*) was totally different from this. There there was a settlement subject to a general power of appointment in the settlement in the settler, and this having been made in 1858, the settler made his will in 1862, and by that will you see an intention expressed that it should not operate as an execution of the power over the unappointed property. The case was decided upon a contrary intention appearing in the will itself. In *Stillman v. Weedon* (†), where property was settled as the settler should appoint by deed or will, to be executed in manner therein mentioned, it was held that the will, though made before the settlement, was a good execution of the power. A similar decision was made in *Patch v. Shore* (‡) and in *Cofield v. Pollard* (§) ; and in *Hodsdon v. Dancer* (¶), where the will was made in 1845, and in 1849 certain real estate was settled to such uses as the testator should by will appoint, it was held that, upon the true construction of the 24th and 27th sections of the Wills Act, the disposition by the prior will was a good execution of the power contained in the subsequent settlement. The principle is well expressed in the case of *Seriven v. Sandom* (¶). The Court cannot decide in opposition to these au-

(*) 2 Sm. & Giff., 458.

(†) 16 Sim., 26.

(‡) 2 Dr. & Sm., 589.

(§) 3 Jur. (N.S.), 1203.

(¶) 16 W. R., 1101.

(¶) 2 J. & H., 743.

thorities, but must hold the will to be a good execution of the power in the settlement.

[They also cited *Bush v. Cowan* ⁽¹⁾, in which the Master of the Rolls made observations upon *Moss v. Harter*, and Lord St. Leonards on Powers ⁽²⁾.]

SIR R. MALINS, V.C.:

This case is certainly not free from difficulty; but upon the whole I come to the conclusion that the settlement remains in force. I cannot receive parol evidence to show the intention of *the testator in executing his will, but in order to put [272 a construction upon the instruments which he executed, namely, the will, and the voluntary settlement in question, I can look at all the surrounding circumstances to see as well as I can what was the intention of the testator in executing those instruments.

It appears by the evidence that Rogers Ruding was at one time a man of good property, but having lost it all he had no means of providing for his two illegitimate children. There is the affidavit of the mother of one of the children, which is not attempted to be contradicted, showing the promise which was made by J. C. Ruding. Rogers Ruding died in August, 1856. John Clement Ruding made his will on the 2d of December, 1857, and by that will no provision was made for the illegitimate children of his brother.

Upon the general question I intend to raise no doubt that a will containing a general bequest of property under the 27th section of the Wills Act passes all property which the testator has at the time of his death, including all the property over which he has a general power of appointment, whether the general power was created before or after the date of the will. Upon that subject I must be understood as not raising the slightest doubt.

Five weeks after the date of the will, that is, on the 6th of January, 1858, J. C. Ruding executed the settlement in pursuance, I take it to be perfectly clear, of the engagement which he had entered into with his brother, the solemn promise which he had given his dying brother.

On the 6th of January, 1858, then, Mr. J. C. Ruding must be considered as knowing that he had made a will by which he gave all his property to the legitimate children of his brother. He knew, therefore, that if this will operated as an execution of this power, and he had died the day after the execution of this instrument, his will, which was executed five weeks before, would absolutely have taken away that very provision which he had made for these children of his brother. Now could he possibly have intended that? I must attribute to him the knowledge that the will, if it remained unaltered, would come into

(1) 82 Beav., 238.

(2) 8th Ed., p. 805, &c.

operation, and he knew that if that will took effect his brother's legitimate children would take everything. Although it is perfectly true that, as a general rule, under the words of the Act, 273] a general *bequest will pass all property over which a testator has a general power of appointment, yet I think there is nothing in the Wills Act which prevents the Court looking at all the surrounding circumstances, and seeing whether it is possible to say that the testator could intend his will to have that operation. Now, knowing that his will would pass all his property, am I not bound to decide that by this settlement he intended to take something out of the operation of his will? If he intended to take out of his will the property comprised in this deed, then all is perfectly rational. Can I arrive at that conclusion? The letter the testator wrote to Mrs. Perette seems to corroborate the view I take of the case, that although he intended to reserve the power of revoking the trusts of the settlement, it was his intention to execute the power which he was to have either by a deed, which would necessarily be executed, afterwards, or by a will, which was not to be a will already executed, but a will which he might thereafter execute. The cases which have been cited of *Stillman v. Weedon* ⁽¹⁾, *Cyfield v. Pollard* ⁽²⁾, *Patch v. Shore* ⁽³⁾, and *Hodsdon v. Dancer* ⁽⁴⁾, were all cases totally different from the present, where the effect was not to defeat anything the testator had shown a deliberate intention of doing, and which would remain undone except by some subsequent act; but they were cases proceeding upon the doctrine that a bequest in a general form, in the absence of such extraordinary circumstances as exist in this case, will operate as an execution of a power whether it come before or after the making of a will, whether created by a different person or by the testator himself. But here I come to the conclusion that it was the intention of the testator to take this out of his will because he knew that by his will he had disposed of all his property. The recital in the settlement and the evidence of the person who nursed Rogers Ruding in his last illness afford the strongest proof of this intention. Is it not the duty of the Court, if it can possibly see any rational way of getting out of the strict rule of law in such a case as this, where the intention is, beyond doubt, to do so? Mr. Glasse, representing members of the family, very properly did not argue the case. Mr. Cole, I am sure, would have 274] taken the same view if he had not *represented person-abroad who are incapable of binding themselves; but under the circumstances it was his duty to say all that could be said for them. I think it is perfectly clear that to set aside this settlement would defeat the testator's intention; and I come to the

⁽¹⁾ 16 Sim., 26.⁽²⁾ 2 Dr. & Sim., 539.⁽³⁾ 8 Jur. (N.S.), 1203.⁽⁴⁾ 16 W. R., 1101.

conclusion I do, on the particular circumstances of this case. I am bound to say now that I do not think I am going one title further than Vice-Chancellor Stuart did in *Moss v. Harter* ⁽¹⁾, where he saw that the intention would be effected by the construction put upon the will. The words there were "not otherwise disposed of in this my will," and the Vice-Chancellor went rather far in coming to the conclusion that it meant "not otherwise disposed of by another instrument." I am fortified in that view by the passage read from Lord St. Leonards' Treatise on Powers ⁽²⁾, where, after citing *Moss v. Harter*, he says — what I entirely concur in — "The case is not without difficulty, but where the property is, as in this case, settled by the testator himself upon others in default of any appointment by him under his power, it would seem to require some indication of an intention by him to defeat his settlement in order to hold a general gift in his will, which can be satisfied by other property, to be an execution of his power."

I think, therefore, in this case, where the testator has shown so deliberate an intention to settle property upon others, under the very peculiar circumstances of this case it is my duty, in accordance with that, to come to the conclusion that it requires some strong circumstances to lead to the opinion that he intended a will already made, which if he had died an hour after the settlement was executed would have entirely defeated the settlement, should have that effect. I think I put the right interpretation upon his acts, looking at all the surrounding circumstances and the contents of the deed, in coming to the conclusion that what he intended when he reserved a general power by the settlement was that it was to be exercised by a will thereafter to be executed and not by a will already executed. Upon these grounds, I decide that the settlement of 1858 remains in full force, and that the general power contained in it was not executed by the will of the 2d of December, 1857.

It further appears that the testator having died in 1860, this *interpretation of the settlement was acted upon by all [275 parties for twelve years.

The order will be, the Court being of opinion that the will of the 2d of December, 1857, did not execute the power contained in the settlement of the 6th of January, 1858, order payment accordingly.

The costs of all parties must be paid out of the fund, and the residue divided in thirds.

Solicitors for the Petitioner: Messrs. *Johnston & Jackson*.

Solicitors for the Respondents: Mr. A. T. Cox.; Messrs. *Vandercom, Law, & Co.*

(1) 2 Sm. & Giff, 459.

(2) 8th Ed., pp. 305, 306.

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V.-C.B. May 22 ; June 26, 1872.

**In re TRUEMAN'S ESTATE.*

HOOKE v. PIPER.

[Law Reports, 14 Equity Cases. 278.]

1871 T., 119.

Winding-up—Costs of Liquidation—Personal Liability of Liquidator.

A liquidator appointed under a resolution to wind up voluntarily is not personally responsible to the solicitor employed by him in the affairs of the liquidation for any of the costs of such liquidation.

ADJOURNED SUMMONS upon a claim by Messrs. Hooke & Street, solicitors, for their bill of costs against the estate of Joseph Trueman, deceased, one of the directors and the chairman, and also one of the liquidators under a voluntary liquidation of the Madras Coffee Company, Limited :

(a). In relation to winding up the company and proceedings before the liquidators, under the resolution to wind up voluntarily.

(b). Costs of directors in opposing a petition to wind up under the direction of the Court, with costs of action for recovery of papers of the company.

(c). Costs in Chancery suit of *Rayner v. Madras Coffee Company* and the directors, Trueman, Cockerell, Holland, and Hills.

The company was formed in 1861, and from 1866 Trueman, who was one of the original subscribers and directors, acted as chairman. Mr. Hooke, of the firm of Hooke & Street, solicitors, was a shareholder (fully paid-up), and the business on behalf of the company in respect of which the present claim was made began in November, 1867.

In December, 1868, Hooke was instructed by Trueman to call a meeting to consider a proposition for winding up voluntarily, and forming a new company to purchase the estates of the company in India. The proposition fell through, from the presentation of a petition for a compulsory winding-up by Rayner, a former manager of the company, and others. The petition, which was opposed on behalf of the directors, was dismissed with costs. A bill was soon afterwards filed by Rayner against 279] the company and the directors *personally, to establish his claim and to restrain the sales of the estates to the proposed new company. On being informed by Hooke of the filing of this bill, Trueman wrote to him on the 20th of February, 1869 : "I am much obliged by your note of yesterday ; and I now request and authorize you to act on my behalf with regard to the matter therein mentioned ;" and again, on the 1st of March, 1869 : "I suppose we must now fight Rayner to the death, as he, or rather his advisers, do not seem amenable to reason."

The bill was ultimately dismissed with costs. On the 22d of March, 1869, a resolution for a voluntary winding-up was passed and confirmed, and Messrs. Trueman and Kimber were appointed liquidators. Under the liquidation Rayner brought in a claim, which was contested by the liquidators and disallowed. On the 2d of May, 1871, Trueman died.

No proceedings has been taken under the liquidation since Trueman's death, there being no uncalled capital and no assets or funds to meet the expenses of further proceedings.

After Trueman's death, his three co-directors had agreed to pay sums amounting to £180 towards Messrs. Hooke's bill of costs, leaving a balance of over £300 to be recovered from Trueman's estate. The executors of Trueman objecting to pay more than was paid by the other directors, Messrs. Hooke & Street had commenced a suit by summons for the purpose of recovering their bill of costs from the estate of Trueman, and their claim now came on by adjournment from Chambers.

The material question was, whether the estate of Trueman was liable for the costs of the liquidation as distinguished from the costs of opposing the petition for a compulsory winding up and the costs of defending the suit against the company and the directors personally, in respect of which Trueman had given a retainer to Hooke.

Mr. Mackeson, Q.C., and Mr. Dauney, in support of Mr. Hooke's claim, contended that Trueman's estate was primarily liable for the costs of the business done for the company, and for which, as one of the directors personally interested, he had given a written retainer. The costs of the liquidation were covered by that retainer, and could not be distinguished from the costs of resisting the petition to wind up and defending the suit [280 against the company and the directors personally.

[They cited *In re Massy* ⁽¹⁾ *Companies Act*, 1862, sect. 144.]

Mr. Kay, Q.C., and Mr. Marten, for the representatives of Trueman:

Liquidators cannot be made personally responsible for any of the costs of the liquidation. They are not trustees for creditors, so as to exclude the operation of the Statute of Limitations, and the assets do not vest in them, but the property remains in the company, subject to the control of the Court exercised as a rule through the liquidator: *In re General Rolling Stock Company* ⁽²⁾. Even assuming that any liability attached to them personally. Trueman was not the sole liquidator, and it is a bare joint liability which will not survive, and no creditor's suit can be maintained against the estate of one of the liquidators after his

⁽¹⁾ Law Rep. 9 Eq., 367.

⁽²⁾ 20 W. R., 621.

death: *Clark v. Bickers* ⁽¹⁾; *Richardson v. Horton* ⁽²⁾; *Ravston v. Parr* ⁽³⁾; *Other v. Iveson* ⁽⁴⁾. In any case the surviving liquidator is a necessary party, and the claim cannot be entertained in his absence: *Hills v. M' Rae* ⁽⁵⁾.

[They also cited *In re Audley Hall Cotton Spinning Company* ⁽⁶⁾; *In re Marlborough Club Company* ⁽⁷⁾.]

Mr. Mackerson, in reply.

SIR JAMES BACON, V.C., after stating the question, continued:

As to the retainer, it is unquestionable that Messrs. Hooke & Street were retained by Mr. Trueman personally as his solicitors in his character of defendant to the suit of *Rayner v. Madras Coffee Company, Limited*, and for all the costs so incurred his estate is liable. The question about the winding up petition is somewhat different, and rather more difficult. When the 281] petition was presented *it was resolved to oppose it, and opposed it was for the company, but it was also opposed for Mr. Trueman, who writes in March, 1869: "We must fight Rayner to the death." Counsel was applied to, and, in consequence of his advice, a separate brief was delivered. For so much of the business Messrs. Hooke & Street have, I think, a charge against Mr. Trueman's estate, whatever the amount may be. As to the charges for the liquidation, there is no ground upon which Mr. Trueman's estate can be charged with any part of them. I take the meaning of the winding up Acts to be, that when there is a voluntary liquidation by resolution of the company, and a liquidator is appointed, the only effect is to displace the directors, and to put into the hands of the liquidator the winding-up which has been resolved upon, but still as the agent of the company, having no personal interest, but merely to execute whatever is necessary in order to effect the winding up, and that there is nothing in the nature of the transaction upon which the liquidator can be said to incur any personal responsibility. It is clear to me, beyond the possibility of doubt, that he never does incur any liability; that it is not his intention, nor the intention of any solicitor whom he employs in that business, ever to assert that there did exist any personal liability between them. The business of the liquidator is to realise and administer the assets: if there are enough, well and good; if not enough, people must go unpaid. The solicitor knows that that is the end and object of the appointment of the voluntary liquidator. The liquidator has no interest in the matter, except simply for his remuneration, which is to come afterwards; he has no right or

(1) 14 Sim., 639.

(2) 6 Beav., 185.

(3) 3 Russ., 424, 589.

(4) 3 Drew., 177.

(5) 9 Hare, 297.

(6) Law Rep. 6 Eq., 245.

(7) Law Rep. 6 Eq., 519.

interest in any particle of the assets he is to realise, receive, and distribute, and to do the best he can with; and the solicitor undertakes the employment with a perfect knowledge on the subject. The Act of Parliament which provides that the funds of the company, the assets, shall be the source from which the payment shall be made does not in terms contemplate the possibility of the assets being insufficient, nor was it necessary that it should, because if that happens somebody must go unpaid. The clause referred to (sect. 144) points out the order and degree in which the costs and other charges shall be paid, putting the remuneration of the official liquidator last. Upon the reason of the thing, upon the terms of the Act of Parliament, in my opinion, no *doubt can possibly exist. The case cited, *In re* [282 *Massey* ⁽¹⁾] in my opinion disposes of the matter conclusively.

[His Honour, after referring at length to that case, and the judgment of Lord Romilly, continued:]

I take that case, then, to have decided, in the plainest manner possible, that the credit is given to the assets; that an official liquidator incurs no personal liability, except by means of some contract, and that the solicitor is entitled to be paid out of the assets of the company, whether the liquidator is dead or alive. His exertions entitle him, when there are assets, to be paid every farthing of the costs that have been incurred in the liquidation, but he has no right whatever to recover costs against the liquidator. His only right against the liquidator is, that he is entitled to be paid his costs in priority to any remuneration that the liquidator might otherwise claim.

With these observations, I think it is fair, under the circumstances, that the claim made against Trueman's estate should be changed in some shape. A bill of costs should be made out which should contain no items for which Mr. Trueman was not liable, or for which, if he were now alive, the solicitors could not bring an action against him personally. For all that they have done for him personally they are entitled to be paid out of his estate; all that they have done for him merely in his capacity of a director they have no claim for against his estate. The defence to the Chancery suit, and the opposition to the petition for winding up, are matters which, when the costs come to be taxed, will be properly within the province of the taxing master. But as to the costs of the winding up, I am of opinion that the claim is wholly without any foundation, and that Messrs. Hooke & Street, the solicitors, are entitled to claim nothing personally against the estate of Mr. Trueman in respect of any business done for Mr. Trueman from the time when he was appointed one of the two liquidators.

(1) Law Rep. 9 Eq., 367.

The matter will be referred back to Chambers, with an intimation of opinion that Mr. Trueman's estate is liable for the costs of his personal defence of the suit and his personal opposition to the petition to wind up, but not for any other part of such defence or opposition, nor for any of the costs of the solicitors in the winding up, nor costs of business of the company.

283] . *June 26. A difficulty having arisen before the registrar in drawing up the minutes of the order, the case was again brought before the Court, and in the result the following directions were given :

1. That the estate of Trueman is liable to the costs of the personal defence to the suit of *Rayner v. Madras Coffee Company* on his separate retainer referred to in the affidavit of Hooke, and is not liable for any other costs of defence to the said suit.

2. That the estate is liable for testator's costs of his personal opposition to the petition to wind up the company compulsorily, and is not liable for any other costs of the opposition to such petition (*); is liable to the costs of the private business, if any transacted for the testator personally (*); is not liable for any of the costs of the business of the company or for any of the costs of the liquidation of the said company.

Solicitors : Messrs. *Hooke & Street* ; Messrs. *Thomas & Hollams*.

An executor or administrator is personally liable for counsel fees or other debts he incurs. *Wilcox v. Smith*, 26 Barb., 818 ; *Ferrin v. Ferrin*, 41 N. Y., 815, reversing 53 Barb., 76 ; *Mygatt v. Wilcox*, 45 N. Y., 306 ; and so a guardian ; *Bowman v. Tallman*, 2 Rob., 385, 41 N. Y., 619.

V.-C.B. June 4, 12, 1872.

FISHER v. WEBSTER.

[Law Reports, 14 Equity Cases, 288.]

1871 F. 14.

Will—Construction—Absolute Interest—Indefinite Failure of Issue—Remoteness.

Testator, by will made in 1831, after a gift of leaseholds to his daughter E., gave all the remainder of his property whatsoever to his wife D., the income to her for life, and at her death unto E., for her own benefit and her children, or one only child if she should have any (all that was given to E., being for her own benefit, and not to be subject to the debts, control, or disposition of any husband she might marry); but if E. should die without issue the leaseholds were to be enjoyed by D. for life, and at her death to his sister S. for her life, and at her death, together with all that was left to D. for her life, to be equally divided between all the grandchildren of S.

E. died without having had a child

Held, that E. was entitled absolutely both to the leasehold specifically bequeathed to her and to the residue given subject to D.'s life interest, and that the limitations over, if E. "should die without issue," were void for remoteness.

JAMES NOKES, by his will, dated the 20th of December, 1821, after giving certain pecuniary legacies, proceeded as follows :

"I give unto my daughter Elizabeth Harris Nokes all my two-third shares, right, title, and interest in a leasehold estate held under the governors of Christ Hospital, in the parish of Saint Leonard's, Shoreditch, Middlesex. I give and bequeath unto my wife Elizabeth Nokes all my rights and title to an income arising from the purchase of land tax on her estates in the parish of Saint Mary, on the level of Romney Marsh, and in the parish of Shoulden, both in the county of Kent, and her heirs for ever. I give unto my wife Elizabeth Nokes all my household goods, ready money, and whatsoever is found in my house at the time of my decease, for her own use and benefit, all the remainder of my property, freehold and leasehold estates, money in the funds, or of whatsoever description it may be, after all my just debts and the proving of this my will are paid; the rents and interest unto my wife Elizabeth Nokes for her life, and at her decease unto my daughter Elizabeth Harris Nokes for her own benefit and her children, or one only child, if she should have any. All that is willed unto my daughter Elizabeth Harris Nokes to be under her own care and for her own benefit, and not to be subject to the debts, engagements, control, or disposition of any husband, if she should marry, but her receipt to be a sufficient and the only proper discharge notwithstanding her coverture. Now, if it should so happen that my daughter Elizabeth Harris Nokes should die without issue, then my will is, that the leasehold estate in Shoreditch shall be enjoyed by my wife Elizabeth Nokes for her life, and at her decease to my sister Sarah Church for her life, and at her decease, together with all that is left to my wife Elizabeth Nokes for her life, to be equally divided between all the grandchildren of my sister Sarah Church."

The testator died on the 25th of February, 1825. His widow, Elizabeth Nokes, died on the 26th of October, 1837, having, by her will, appointed Elizabeth Harris Nokes sole executrix and residuary legatee.

Elizabeth Harris Nokes, the only child and sole next of kin of the testator, was married in the testator's lifetime to Thomas Rippon (whom she survived), and died on the 10th of November, 1870, without having had issue.

Sarah Church, the testator's sister, died on the 2d of February, 1825. She had nineteen grandchildren, most of whom were born in the lifetime of the testator.

*The plaintiff, J. C. Fisher, and defendant, Elizabeth Webster, as executor and executrix of Mrs. Rippon, were now, under the circumstances, the legal personal representatives of the testator. The question in the suit which was instituted for the administration of the testator's estate, was whether Mrs.

Rippon took an absolute interest in the testator's residuary estate, or a life interest only, so that on her death without issue the grandchildren of Sarah Church were entitled, in which question was involved that of whether the gift over, if E. H. Nokes should die without issue, was void for remoteness.

Mr. *Bristowe*, Q.C., and Mr. *R. O. Turner*, for the plaintiff.

Mr. *Eddis*, Q.C., and Mr. *Whitehorne*, for *Elizabeth Webster*, legal personal representative, and a beneficiary under the will of Mrs. *Rippon* :

First: The effect of the will was to give to Elizabeth Harris Nokes and her children an immediate estate as joint tenants: *Newill v. Newill* ⁽¹⁾; *De Witte v. De Witte* ⁽²⁾. Secondly: The gift over upon the failure of issue of Elizabeth Harris Nokes is void for remoteness, and she took the absolute interest, as in the case of a will (as this) made before the 1st of January, 1838, such a bequest over, whether of real estate or of personalty, is taken to mean after a general failure of issue, and is not confined to a failure of issue at the death of Elizabeth H. Nokes: *Candy v. Campbell* ⁽³⁾ (affirming *Campbell v. Harding* ⁽⁴⁾); *Benclerk v. Dormer* ⁽⁵⁾; *Pride v. Fooks* ⁽⁶⁾; *Simmons v. Simmons* ⁽⁷⁾.

Mr. *Swanston*, Q.C., and Mr. *Shebbeare*, for the grandchildren of Sarah Church, contended that the gift to Elizabeth Harris Nokes was cut down to a life interest, with remainder to her children, by the subsequent words, if she "should die without issue": *Mason v. Clarke* ⁽⁸⁾; *Jeffery v. De Vitre* ⁽⁹⁾; *Froggatt v.*

Wardell ⁽¹⁰⁾; and, secondly, that the gift over was not too remote, as the words, if "she should die without issue," must be construed referentially, having regard to the whole scope and object of the will, and did not mean a failure of issue generally, but were confined to the death of E. H. Nokes without children: *Robinson v. Hunt* ⁽¹¹⁾; *Carmack v. Cypous* ⁽¹²⁾; *Bryan v. Mansion* ⁽¹³⁾.

Mr. *Kay*, Q.C., and Mr. *Warrington*, for other parties in the same interest:

Dying without issue is confined to a failure of issue at the death of the first taker, for the persons to whom it is given over were then in existence, and life estates only were given to them: *Roe v. Jeffery* ⁽¹⁴⁾. The unwillingness of the Court to extend the artificial construction of an indefinite failure of issue

⁽¹⁾ Law Rep., 7 Ch., 253.

⁽²⁾ 11 Sim., 41.

⁽³⁾ 2 Cl. & F., 421.

⁽⁴⁾ 2 Russ. & My., 390.

⁽⁵⁾ 2 Atk., 808.

⁽⁶⁾ 3 De G. & J., 252.

⁽⁷⁾ 8 Sim., 22.

⁽⁸⁾ 17 Beav., 126.

⁽⁹⁾ 24 Ibid., 296.

⁽¹⁰⁾ 8 De G. & Sm., 685.

⁽¹¹⁾ 4 Beav., 450.

⁽¹²⁾ 17 Ibid., 397.

⁽¹³⁾ 5 De G. & Sm., 737.

⁽¹⁴⁾ 7 T. R., 589.

to a gift of personal estate is shown by the different construction applied to both descriptions of property in the same sentence: *Forth v. Chapman* ⁽¹⁾. The gift must therefore be construed as giving an absolute interest to E. H. Nokes, subject to a contingent executory bequest in favor of Mrs. Church's grandchildren to take effect upon the event which has happened of the death of E. H. Nokes without children living at her death: *Greenwood v. Verdon* ⁽²⁾; *Parker v. Birks* ⁽³⁾; *Coltsmann v. Coltsmann* ⁽⁴⁾; *Thompson v. Fisher* ⁽⁵⁾.

Mr. Ford, for other parties, referred to *Dawson v. Bourne* ⁽⁶⁾; *Cormack v. Copous* ⁽⁷⁾.

Mr. Eddis, in reply:

In re Rye's Settlement ⁽⁸⁾ shows that, notwithstanding *Roe v. Jeffery*, the creation of life estates after the failure of the issue would not be sufficient to restrain the meaning to failure of issue at the death of the first taker: *Hawkins on Wills* ⁽⁹⁾. The words "die without issue" must have their legal signification, that is, death without issue generally, unless there are expressions or *circumstances from which it can be collected [287 that they are used in a more confined sense: *Barlow v. Salter* ⁽¹⁰⁾.

June 12. SIR JAMES BACON, V.C.:

In this case a point of construction arose upon the will of the testator James Nokes, dated the 20th of December, 1821; the question being whether a gift over after the death of his daughter Elizabeth, without issue, failed as being too remote.

[His Honor, after stating the will, continued:]

The testator died in March, 1825, leaving his widow and his daughter surviving him. The widow died in 1837, and the daughter in November, 1870, without ever having had a child. Sarah Church had nineteen grandchildren, and the question therefore lies between the legal personal representatives of the daughter and the grandchildren of Sarah Church. On the part of the daughter's representatives it is argued that the gift of the leasehold in Shoreditch to the daughter being in absolute terms, there can be no doubt as to the interest which she took under that bequest — that the gift of the residue after the death of the widow "for her own benefit and her children, or one only child if she should have any," would have created a joint tenancy between her and her children if she had had any, and that in the events which happened she became entitled absolutely to that residue; and this being so, that the gift over if she should

⁽¹⁾ 1 P. Wms., 663.

⁽²⁾ 1 K. & J., 74.

⁽³⁾ 1 K. & J., 156.

⁽⁴⁾ Law Rep., 3 H. L., 121.

⁽⁵⁾ Ibid., 10 Eq., 207.

⁽⁶⁾ 16 Beav., 29.

⁽⁷⁾ 17 Ibid., 397, 402.

⁽⁸⁾ 10 Hare, 106, 111.

⁽⁹⁾ Page, 210.

⁽¹⁰⁾ 17 Ves., 479.

"die without issue," is void for remoteness, and her absolute right to the residuary estate of the testator remains unaffected. On the part of the grandchildren of Sarah Church this claim is disputed, and it has been argued that the bequest of the residue in favor of the daughter and her children, if she should have any, together with the provision for her separate use, plainly indicates that it was the intention of the testator that the residue should be so settled as to give her only a life interest, and that the Court is always desirous of taking hold of any circumstance which will enable it to give effect to such an intention; and several cases were referred to which establish that principle. 288] It was further insisted that the gift over of life estates *to the testator's widow and to his sister prevented the limitation from being too remote; and upon that point reliance was placed upon *Roe v. Jeffrey* ⁽¹⁾. The case was very fully and ably argued, and many instances were referred to in support of the propositions laid down on either side.

In all questions of construction, the only safe guides to their determination are to be derived from the decisions which have established principles clear and certain, and although an almost infinite variety of cases may readily be found in which some apparent analogies may be traced, or somewhat similar circumstances are presented, nothing would be more dangerous than to adopt them as establishing or interfering with the rules which have affixed certain determinate meanings to technical expressions: *Towns v. Wentworth* ⁽²⁾. It cannot be said that the questions which are here raised are without difficulty, but I think the difficulty is removed by the cases in which I find such rules to have been established upon authority by which I am at the same time directed and bound. In the recent case of *Newill v. Newill* ⁽³⁾, the Lord Chancellor had to deal with a bequest in terms very similar to those which occur in the will before me, the gift being to the testator's wife "for the use and benefit of herself and of all my children." The suggestion that the Court will take hold of slight circumstances for the purpose of effecting a settlement on a mother and her children was the principal subject of consideration.

The Lord Chancellor recognized the principle, and although not wholly approving of it, expressed no unwillingness to adopt it if the circumstances of the case had required it, but he said, "What is there in the joint tenancy between her and her children more inconsistent with her having the management of the whole fund than there is in a tenancy for life with remainder to her children?"

Nor can I say that the declaration of the testator in the pre-

(1) 7 T. R., 589.

(2) 11 Moo. P. C., 526

(3) Law Rep., 7 Ch., 253.

sent case, that such interest as his daughter was to take should be protected against any interference by her husband, had the effect of qualifying or diminishing the amount of that interest, or as leading to the conclusion that he meant anything other than his words *express. It appears to me, therefore, clear that, ac- [289
 cording to the plain construction of the will, the daughter of the testator was entitled absolutely, as well to the leasehold estate specifically bequeathed to her as to the residue of the testator's estate, subject only to her mother's life interest. The other question is whether the gift over upon her dying without issue can take effect; and upon this the general rule of law is too clear to be disputed, and indeed it has not been disputed in the course of the argument. In *Campbell v. Harding* (1) most of the leading authorities on the point were fully examined and commented upon by the Lord Chancellor. The question there arose upon a will by which the testator had given to Caroline Harding a share of stock, "but in case of her death without lawful issue, I then will the money so left to her to be equally divided betwixt my nephews and nieces who may be living at that time." The will further contained a provision for her maintenance, and a declaration that if she married it must be with the consent of the guardians appointed, and the property to be solely settled upon herself and children. The Vice-Chancellor had decided, upon the original hearing, that Charlotte Harding took an absolute interest in the stock, and that the bequest over being limited after a general failure of issue was void. Upon the hearing of the appeal, besides the arguments derived from the will that the testator ought to be held to have directed a settlement, the case of *Roe v. Jeffery* (2) was, among others, relied upon. That case is spoken of by Sir E. Sugden, in arguing for the respondent, as an anomalous case, and as one which would perhaps hardly be followed out at the present day. The Lord Chancellor examines it with great minuteness, and, without impugning its authority, points out the grounds upon which the decision there might be supported as an executory devise, and particularly that the words of the gift over there were, in case the first taker should "depart this life and leave no issue" a distinction from the present case so plain as to prevent the application of *Roe v. Jeffery*, even if the weight of its authority had been less questionable than it has been contended to be. The decision of the Vice-Chancellor having been affirmed on this appeal, the case was afterwards carried to the House of Lords, and is there reported under the title of *Cundy v. *Campbell* (3). In the judgment there given (the appeal [290
 being dismissed), the Lord Chancellor adheres to the opinion

(1) 2 Russ. & My., 390.

(2) 7 T. R., 589.

(3) 2 Cl. & F., 421.

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he had expressed in the Court of Chancery, and states the rule of law in very explicit terms ⁽¹⁾. "The law was formerly doubtful as applied to cases of this description, but it is now quite settled that if a gift is made to A, and on failure of issue or if A, die without issue, then to B, such a bequest over, whether it be of real estate or of personalty, being taken in the legal signification of the terms to mean after a general failure of issue, a failure of issue at any time, is void for remoteness, and the absolute interest is given to the first taker unless there appears something in the will indicating a different intention. It is true, as has been urged, in the argument at the bar, that you are not, in construing the bequest, restricted to that part only of the will; but you may, for the purpose of collecting the testator's intentions, look to other parts of it, and to the whole context."

Now, in this state of the authorities, it appears to me that the Court has nothing to do but to apply the rule of law which is thereby clearly and conclusively established. I am therefore required to declare, and do declare, that the legal personal representatives of the testator's daughter are entitled to that residuary estate which has been ascertained by the proceedings in the cause.

Solicitors: Messrs. *Thompson & Groom*; Mr. *Warmington*.

(1) 2 Cl. & F., 427.

V.C.W. April 22, 23; May 7, 1872.

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*PICKERING v. STEPHENSON.

[Law Reports, 14 Equity Cases, 322.]

1871 P. 163.

Turkish Trading Company—*English Directors*—*Libel*—*Costs*—*Payments Ultra Vires*—*Injunction*.

It is not a mere canon of English municipal law, but a great and broad principle, which must be taken (in the absence of proof to the contrary) as part of any given system of jurisprudence, that the governing body of a corporation which is a trading partnership—that is to say, the ultimate authority within the society itself—cannot, in general, use the funds of the community for any purpose other than those for which they were contributed. Therefore the special powers given to such ultimate authority—whether it be the directors, or a general council, or a majority at a general meeting, by the statutes or other constituent documents of the association (however absolute in terms)—are always to be construed as subject to a paramount and inherent restriction that they are to be exercised in subjection to the special purposes of the original bond of association.

English directors of a foreign railway company, which was subject to Turkish law (as to which there was no evidence before the Court), were restrained from applying the funds of the company in the further payment of the costs of a prosecution for libel brought by them against a person who had acted as secretary to a committee of the company; but were not, under the circumstances of the case, ordered to repay the amount of certain of the costs already so satisfied by them

MOTION FOR DECREE. The plaintiff in this suit was a holder of 500 shares in the Ottoman railway from Smyrna to Aidin, of his Imperial Majesty the Sultan; and he filed the bill in the suit on behalf of himself and all others the shareholders of the company, except such as were defendants thereto, against both the council of administration (or directors) of the company, and the company.

The company was created by a concession and firman of the Sultan. The instruments were written in the Turkish language. The concession was in form an agreement relative to the railway from Smyrna to Guzel Hesar, Aidin, and dated in the year of the Hegira, 1273, the 23d Mouharrem, which corresponded with the year 1856, the 23d of September. It was made between the Turkish Ministers of Foreign Affairs, of Finance, and of Commerce and Public Works, of the one part, and Mr. Robert Wilkin, as the *duly authorized attorney for Sir Joseph [323 Paxton, George Wythes, William Jackson, and Augustus William Rixon, founders of the company, of the other part. The concession contained thirty articles. It provided (*inter alia*) that the company should complete their main line of railway, and the electric telegraphs by the side of it, within four years from the date of the firman; that Government land should be given to the company on the title of a gratuitous lease; that private land might be expropriated; for royalties on coal mines; the due supply of materials; and the verification of expenditure. Further, it provided that (Art. 16) the sum of £24,000, which represented £2 per cent. on the capital of £1,200,000, should be deposited as security for all the clauses of the agreement: that (Art. 17) the railway should be named as above, and be placed under the high supervision of the Sublime Porte, in order that the principles of the concession, and the general laws of the empire, might be maintained and respected: that (Art. 18) the concession should enure for fifty years, with certain powers of renewal; and (Art. 19) of re-purchase by the Turkish government: that (Art. 20) the state should guarantee to the company during the fifty years of the concession interest at 6 per cent. per annum, upon the capital employed by it, until it reached at the highest a sum of £1,200,000 on the execution of its works; that if the capital employed was less than that amount, the state should pay the interest in proportion, but not beyond that amount; so that the interest annually guaranteed by the state could not exceed £72,000; that whenever the net profits of the line should exceed £7 per cent. on the guaranteed capital, the excess should be divided equally between the company and the government: that (Art. 22) no concession should be granted for a competing line without the consent of the company: that

(Art. 24) the company should obtain, by the issue of shares, the necessary capital for the construction of the line, reserving a quarter of the shares for the subjects of the Sublime Porte, at the same price and on the same conditions as to the other subscribers; and that such of the shares as should not be subscribed for within the term fixed by the company, should return to the disposition of the same: that (Art. 25) the company should draw up its statutes, fix general tariff, and make special regulations in the usual manner, *submit them to the imperial government for its approval, and put them in operation after having obtained the sanction of the Sultan; that the company, as a body, should always be subject to the existing and future laws and general regulations of the empire, and that persons likewise in the company's service should be individually under the protection of the nations to which they belonged; but all civil and criminal actions brought against them should be conformable to precedents established in similar cases. The firman was dated the 15th day of the month Sefer-ül-Khair, of the same year 1273, which corresponded with October, 1856. It referred to the parties represented by Mr. Wilkin, as persons well known in England, and described them as "founders of the company formed in London" for the construction of the railway; and it ordained that the company should form itself under the name of Ottoman company for the fifty years; and should always be under submission to the laws of the Sublime Porte, and placed under its supervision.

The statutes of the company, which were also in the Turkish language, provided (*inter alia*) that (Art. 1) the signatories thereto should form, under the authority of the Sultan, an anonymous partnership, which should exist between all the proprietors of the shares issued in pursuance of those presents: that (Art. 2) the objects of the company should be (1) the construction and working of the railway, wharves, piers, warehouses, custom-house, and any other buildings authorized by the imperial concession of the 23d of September, 1856; (2) the construction and working of all or any other railways in the Turkish empire, which might be thereafter conceded to the company, or leased or bought by it; (3) the organization and working of every description of communication, either by land or water, in connection with the railway; (4) the enjoyment and working of all lands, mines, forests, machinery, and other things then or thereafter to be conceded to a purchaser, or leased by the company: that (Art. 3) the seat of the society should be at Smyrna; that the capital of the company (which by Art. 7 was originally fixed at £1,200,000, represented by 60,000 shares of £20 each) should (by an additional article of March,

1864, Art. 1) be raised to £1,784,000; and by Art. 2 be divided into shares and debentures as follows:

*44,600 shares of £20, representing . . £892,000 } £1,784,000
 Debentures bearing £6 per cent. interest £892,000 }

and that of the £892,000 debentures, £304,000 should be [325 held as a first application for the redemption of £250,000 of debentures, issued by order of a previous convention, and repayable on the 1st of May, 1866: that (Art. 8) each share should give a right to a proportionate part of the property and profits of the company: that (Art. 9) provisional or scrip certificates of shares should be issued in the first instance, in exchange for the receipt of the deposit of £1 per share; and should be "to bearer," and transmissible by simple delivery, without any written or formal transfer: that (Art. 11) the shares should be indivisible, and the company would only recognise a single proprietor for each share: that (Art. 12) the holding of a share implied and necessitated adhesion to the statutes of the company: that (Art. 20) the liability of the shareholders would be limited to the payment of £20 per share: that (Art. 21) the affairs of the company should be managed by a council of administration in London, composed of (additional article, 30th May, 1862, Art. 1) nine members: that (Art. 30) the place of meeting of the board might be either in the Ottoman Empire, France, or England, as might from time to time be determined on by the council itself: that (Art. 40) the council of administration should be invested with the fullest powers for the administration of the affairs of the company, and that (*inter alia*) it should (clause *n. ad finem*) authorize all legal proceedings, precautionary measures, and agreements for compromise; (clause *o*) nominate and recall all agents and employees, fix their salaries and gratuities, and generally decide on all matters which affected the management of the company; (clause *p*) cause true accounts to be kept of the property of the company, of the sums of money received and expended by the company, and the matters in respect of which such receipt and expenditure took place, and of the credits and liabilities of the company; and (clause *s*) should fix the place of the general meetings: that (Art. 42) the members of the council of administration should not be collectively or individually responsible for or in respect of any contracts or engagements made by the council on behalf of the company, or for any wrongful acts or defaults of the company: that (Art. 43) *the general meeting regularly constituted represented [326 the entire body of shareholders: that (Art. 44) the general meeting should be composed of not less than ten shareholders, holding in the aggregate, either personally or by proxy, 500 shares at least: and should be held in London, or such other place as

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might be appointed by the council of administration during the month of March, and in the month of September during every year: that (Art. 48) a meeting should be regularly constituted when ten shareholders, holding, either personally or by proxy, 500 shares, were present: that (Art. 49) the decisions of general meetings should be taken by a majority of votes: that (Art. 55) a special meeting might be convened either by the directors themselves, or by the written demand of fifteen shareholders holding in all 5,000 shares: that (Art. 56) all general meetings, whether ordinary or special, might decide upon any and every proposal made by shareholders, provided that such proposal had been communicated in writing to the secretary of the company at least twenty-eight days before notice of such general meeting: that (Art. 57) the chairman or deputy chairman of the council of administration, or, them failing, any member of the same, should preside at all general meetings, whether special or ordinary: that (Art. 58) the decision of general meetings should be taken, in the first instance, by a majority of voices; and, in case of equality, the chairman should have the casting vote: that (Art. 60) the general assembly should receive the report of the council of administration on the state of affairs of the company; discuss, approve, or reject the accounts; fix the dividend on the report or recommendation of the council; elect the directors to supply vacancies, in accordance with the preceding clauses; deliberate on any propositions which might be submitted to it by the council of administration, relative to the increase of capital of the undertaking, the prolonging the term, and duration of the company, any modifications requisite to be made in the statutes and winding up of the concern; and that it should have the supreme control over all the interests of the company, and invest the council of administration with the powers necessary to meet any extraordinary cases not thereinbefore provided for: that (Art. 61) the deliberations of the assembly, held conformably to the statutes, should bind all the shareholders, as well *absent as dissentient: that (Art. 69) a printed copy of the balance sheet and report should, seven days previously to the general meeting, be obtainable at the company's offices by any shareholder who might demand same: that (Art. 70) the profits of the company, after deducting the ordinary costs, charges, and expenses, should be applied in the following manner, viz.:

First: "As a reserve fund if thought expedient, and so resolved by the counsel of administration, to meet any losses occasioned by unforeseen circumstances, or to equalize the dividend, or for relaying the permanent way, or for other similar purposes in connection with the works."

Secondly: "In the payment of a dividend amongst the shareholders, subject to the right of the government to participate in the event of the divisible profits exceeding 7 per cent."

That (Art. 73) the accounts should be submitted to the general meeting, which had power to approve or reject them, and fix the dividend upon the report and recommendation of the council of administration: that (Art. 74) if the accounts were not approved of at the general meeting, it should have power to nominate a committee for the purpose of examining into and making a report on same; that such committee should lay their report before a meeting, which it should have power to convene for the purpose: that (Art. 75) the accounts of the company should be examined, and the correctness of the balance sheet ascertained by one or more auditor or auditors; and that (Art. 89) no shareholder of the company should be personally or individually liable for any debts or engagements of the company: but the funds of the company, including therein all unpaid calls upon shares, should alone be answerable for such debts and engagements.

The company duly proceeded with its undertaking, in reliance upon the guaranty of the Turkish government. Memorials with reference to the guaranty were from time to time presented by the directors of the company to the officials of the Sublime Porte. In and for some time prior to 1868, Lord Stanley, who was then Her Majesty's principal secretary of state for foreign affairs, had supported the representations of the company made to him through the council, by authorizing Her Majesty's ambassador at Constantinople to present the company's memorials to the Grand *Vizier, and to render them such unofficial [328 assistance as the facts of their claims might warrant.

On the 31st of December, 1867, the claims of the company upon the Turkish government in respect of the unpaid arrears of the guaranty amounted to a sum of £184,752 14s. 7d.; and early in the month of September, 1868, the counsel instructed their secretary, Mr. Cook, to proceed to Constantinople with a view of urging the Turkish government to come to a definite settlement of the company's claim. Mr. Cook accordingly went to Constantinople, and on the 26th of September, 1868, saw Mr. Ritter, the secretary of the Public Works Department, acting on behalf of the Turkish government. Mr. Ritter informed Mr. Cook that he had received a communication from Daoud Pacha, with a letter from Mr. Ellissen, and handed the letter to Mr. Cook. He read it, and immediately telegraphed the effect of it to the council of administration in London. The telegram was as follows:

“Constantinople.

“Ellissen writes government not to pay guaranty to directors, who had misapplied the same, and may do so again. We have seen letter.”

Shortly before this time some of the shareholders of the company had appointed a committee of investigation into the conduct of the directors. To that committee, however, it is not material more particularly to refer. But on the 2d of June, 1868, others of the shareholders, being also dissatisfied with the conduct of the council of administration, held a meeting, at which the following resolutions were adopted :

“That, in the present position of the company, it is desirable, for the protection of the interests of the shareholders, that a committee of consultation be formed to watch the proceedings of the directors :

“That Mr. Ellissen be requested to act as the honorary secretary of the committee of consultation.”

Mr. Ellissen accordingly acted as the secretary of that committee. In the course of his employment as secretary, and in pursuance of a resolution of the committee, he on the 19th of August, 1868, the 1st of September, 1868, the 5th of September, 1868, and the 30th of September, 1868, wrote certain letters to 329] Lord Stanley. The letters *were strongly condemnatory of the council of administration, or board of directors (as such), for their management of the affairs of the company. They also contained statements alleged to be libellous upon them ; and, on the assumption that, if the Turkish government resumed the payment of the guaranty, all the money so obtained would be misapplied by the directors for payment to the debenture holders of the company, prayed that Her Majesty's government at home, and their representatives abroad, would refuse to support the board of directors. The result was, that Lord Stanley withdrew the limited assistance which he had till that time afforded to the company ; and although Mr. Ellissen then stated that, acting as the organ of the committee of consultation, he had expressed their distrust of the official conduct only of the council, and had in no degree imputed doubts as to the personal integrity of the members of it, Lord Stanley continued the withdrawal of his assistance.

The Turkish government did not at that time pay any further portions of the arrears of the guaranty ; the company was prevented from fulfilling their engagements ; their shares were consequently depreciated ; and the rivalry of factions was added to the other difficulties with which they had to contend. In that state of things, a general meeting or assembly of the company was held on the 30th of September, 1868, at which the council

of administration was present. The following resolution was then proposed :

“ That this meeting distinctly repudiates the unauthorized and unwarrantable proceedings of those who, calling themselves a committee of consultation of the shareholders, are acting in direct opposition to the wishes and interests of the shareholders, and requests the council of administration to adopt the strongest possible measures to put an end to such mischievous action.”

No notice of that proposal had been given to the secretary of the company, as provided by art. 56 of the statutes, and a shareholder who was present pointed out that on that account the meeting was not competent to entertain it. During the discussion which then ensued the plaintiff moved an amendment to the resolution, which was seconded by a M. Mariano Vives — “ That the representations of the directors in the past and present capital and revenue accounts, and also the negotiations with the Ottoman *government, be referred to a com- [330] mittee to investigate and report to a special meeting.” That amendment was lost, and the original resolution was carried by a large majority. A poll was then demanded and granted, and on a scrutiny the result was as follows: For the resolution, 9240 shares, representing 771 votes; against it, none.

The council of administration thereupon instituted criminal proceedings for libel against Mr. Ellissen on the ground of his letters to Lord Stanley. Mr. Ellissen pleaded not guilty, and a justification. The case was tried at the Central Criminal Court before a jury, which, not being able to agree, was discharged. The proceedings were afterwards removed by *certiorari* to the Court of Queen's Bench, where the issue was tried before a special jury, but without a verdict being returned, on account of the jury not being unanimous. On two other occasions, also, the case was opened before a special jury, but not proceeded with; on the first occasion on account of the illness of one of the jurymen, and on the second for want of time at the disposal of the Court to finish the case. The proceedings had been since renewed, and were still pending.

The Turkish government had in the meantime paid the following sums on account of the arrears of the guaranty, viz., on the 28th of August, 1869, £50,000 in mandats; on the 4th of November, 1869, £75,000 in mandats; and a few days after that the sum of £5050 14s. cash.

In 1869 an ordinary general meeting of the company was held, at which it was admitted by the council that of the law costs then charged by them against the company about £200 had been incurred as the costs of the proceedings in the libel.

On the 31st of March, 1871, another ordinary general meeting

of the company was held, to which the statement of the revenue account for the half year ending the 31st of December, 1870, was submitted by the council. In that account the law charges of the company were mixed up with other charges in an item amounting to £1796 18s. 7d., and it was admitted that about £900 of that item had been also incurred as the costs of the proceedings for the libel.

Notwithstanding those admissions, however, the accounts containing those items were respectively approved by those general [331] *meetings. The plaintiff alleged that he had never voted for or concurred in such approval, but protested against it at each of the meetings, and submitted that the costs of the criminal proceedings for the libel were not properly chargeable against the company; and that it was beyond the power of any general meeting or assembly of the company to order or adopt such proceedings or to burden the company with the costs thereof. The bill stated that those proceedings were taken and still persevered in by the council of administration, entirely for their own personal satisfaction and benefit, and for that of a party among the shareholders; that such proceedings did not fall within the objects of the company; and that the council ought to bear the costs thereof; but that they nevertheless had paid, or threatened or intended to pay, such costs out of the moneys of the company. It then prayed a declaration that the costs of the proceedings for the libel were not properly chargeable against, and ought not to be borne by, the company; and that the defendants, other than the company; and all the other officers and servants of the company for the time being, might be restrained by the order and injunction of the Court from applying any moneys of the company in or towards payment of the said costs; that an account might be taken of all moneys of the company which had been applied by the defendants, other than the company, or any of them, in or towards payment of the said costs; that the defendants, other than the company, might be declared liable, and decreed jointly and severally to repay to the company, with interest, so much of the moneys of the company as should be found to have been so applied; and that the defendants, other than the company, might pay the costs of the suit.

The defendants, the council of administration, by their answer admitted (*inter alia*) that they were fully aware, on the 2d of June, 1868, of the differences of opinion among the shareholders of the company. They believed, however, that the committee of consultation was not elected by any of the shareholders, and was a self-appointed committee. They said that, until they had received a letter upon the subject from Lord Stanley's secretary,

they knew nothing of Mr. Ellisen or his committee; and that although directly after the resolution of the 30th of September, 1868, and *on the authority of it alone, they had in- [332 stituted the criminal proceedings for the libel, they had done so as council of administration, and with full power to do so independently of that authority. They insisted, however, that they had acted properly under the concession and statutes of the company, and solely in the interests of it; and denied all personal feeling in the matter. They said that all the costs incurred by the company in respect of the proceedings had been paid at the time the plaintiff filed the bill in this suit, viz., the 6th of November, 1871; and that he could have known that such costs were paid by inquiry at the company's office. Therefore, and having regard to the peculiar constitution of this company, they contended that the plaintiff was bound by what had been done.

Further, they submitted that a suit of *Viver v. Ottoman Railway Company* and two other suits had been instituted against this same company, in other branches of the Court, to settle the priorities of the debenture holders, with which suits (or some or one of them) this should have been consolidated. They also said that the libels were false, malicious, and injurious to the company—that the stopping of them was advantageous to it—and that they were advised they could not abandon the proceedings with respect to them without paying Mr. Ellisen's costs.

Mr. *Lindley Q.C.*, and Mr. *Westlake*, for the plaintiff:

The defendants contend that the expenditure in question is within the scope and objects of this company; that the silencing of Mr. Ellisen has been advantageous to the company; that the plaintiff has acquiesced in what has been done; and that he has been guilty of laches. But, first, no proper notice of the resolution of the 30th of September, 1868, was given. The resolution, therefore, is of no force whatever as against the dissentient shareholders. Assuming that the majority were doing what the minority disapproved of, and that the majority did wish to put an end, as stated, to what was called "such mischievous action," still we contend that the payment of these costs is wholly *ultra vires* the association. Therefore, even although the majority of shareholders at that meeting may have passed the resolution, the company cannot act on it, and the council, that is, the directors, *cannot carry it out or sanction it. Mr. [333 Ellisen was indicted for a libel. He pleaded not guilty, a justification, that the publication of the alleged libel was in the interest and for the benefit of the public. But the important point for us is that the libel was essentially against "individuals," and one with which the company, *quâ* company, had not and

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ants to the suit. But the company also represents all the shareholders, and all the shareholders, we say (other than the plaintiff), approved of what has been done. Therefore, even assuming for a moment that he is right in saying that this expenditure is *ultra vires*, he is wrong in so joining the parties to this suit as he has. We admit that if the expenditure is *ultra vires*, no majority can force it on a minority of the shareholders. But we say that it is not *ultra vires*. These proceedings for libel, and the costs of them, are matters relating to the internal management of the affairs of the company, with which it is quite competent to deal — with which it has dealt — and a subject of its discretion with which this Court will not interfere: *Bloxam v. Metropolitan Railway Company* ⁽¹⁾.

Then, again, having regard to the statutes, the plaintiff has, in fact, acquiesced in what has been done. He was present at the meeting of the 30th of September, 1868, and, notwithstanding ³³⁶ his opposition, and the absence of the requisite notice, he is, by force of the statutes, expressly bound. Indeed, he would have been so even if absent.

[They also cited *Kent v. Jackson* ⁽²⁾; *Elborough v. Ayres* ⁽³⁾.]

Mr. Lindley, in reply:

All the pleadings in this case are framed on the assumption that it is not one of Turkish law. If, however, the Court should think it is, then *Smith v. Gould* ⁽⁴⁾ shows that the burden of proving what that law is lies, not on us, but on the defendants, who rely on it. But the inconvenience of treating this case as governed by Turkish law, affords a strong argument that it is not to be so dealt with. The company's business offices are in London, though the subjects of its administration are at Smyrna, or elsewhere out of England. If Turkish law is to be applied, the defendants, in an action on bonds issued by the administration here, would insist that they could not be sued in this country; and if proceedings were taken on such bonds in Turkey, the defendants there would plead that they must be sued upon here. But the plaintiff is suing the directors of the company, and not the company, except in a technical sense; and as the parties, *i. e.* the plaintiff and directors, are all resident here, the objection to the jurisdiction of the Court cannot prevail.

Then the defendants say, that what has been done has been ratified and acquiesced in by the plaintiff, and they rely for that on the statutes of the company. But there is nothing in the statutes which authorizes the directors of the company who have received money for one purpose to apply it to another, nor

⁽¹⁾ Law Rep., 3 Ch., 337.

⁽²⁾ 14 Beav., 367; 2 D. M. & G., 49.

⁽³⁾ Law Rep., 10 Eq., 367.

⁽⁴⁾ 4 Moo. P. C., 21.

anything to make the prosecution of a man for a libel, not on the company, "an affair of the company." Art. 40 of the statutes, clauses *n.* and *o.*, relate only to "the company," not to wrongful acts done by the directors, of whom alone the plaintiff now complains. So also as to Arts. 60 and 61. Then as to the misjoinder.

The VICE-CHANCELLOR: You need not trouble yourself about that.

*Mr. Lindley: Very well. Then the whole case — if [337 we are right as to the jurisdiction of this Court, which we submit we are — resolves itself into this: that this application by the directors representing the company of money belonging to it, in payment of the costs of a libel, not on the company but on the directors of it, is *ultra vires* the company; and therefore the plaintiff is entitled to the declaration, and the other relief for which he prays.

May 7. SIR JOHN WICKENS, V.C.:

The plaintiff in this case is a shareholder in an association incorporated by a firman of the Grand Seigneur for the purpose of making a railway from Smyrna to Aidin. He sues on behalf of himself and all other the shareholders in the association except the defendants, and seeks an injunction to restrain the members of the council general, or, in other words, the directors, from paying certain costs out of its funds; and an order upon them to restore what has been already paid for costs similarly incurred. The members of the general council and the company, as a corporation, are the defendants. The firman constituting the association is dated in December, 1856. It is, of course, in Turkish, and was preceded by a document in the same language, which is called indifferently a concession and a convention. This latter is an agreement between three Turkish ministers of state on behalf of the government, on the one part, and the attorney of four persons, described as founders of the company, on the other part; and is, in fact, an ordinary concession of the privilege of making a railway and electric telegraph from Smyrna to Aidin, with a power to take government land gratuitously, and other land compulsorily on payment; and other very valuable concessions, including a guaranty of interest. The 24th article of the concession authorizes the raising of the necessary capital by the issue of shares, of which one-fourth is to be reserved for Turkish subjects; and the 25th article provides for the preparation of statutes to be approved by the Turkish government. The statutes, which are in Turkish, like the concession and firman, are very much in the form of ordinary articles of association in a limited English company.

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338] Some *passages of them were relied on at the hearing, and may be adverted to here. [His Honor then referred to the statutes, articles 1, 2, 3, 21, 30, 40, 43, 44, 60 and 61, *ut supra*, and continued:] The costs, with regard to which the question in this case has arisen, are the costs of an indictment for libel against a Mr. Ellissen, himself a shareholder in the company, and the honorary secretary of a committee of shareholders appointed on the 2d of June, 1868, to watch the proceedings of the directors. There had been, it seems, a committee of investigation appointed in the previous year, but that committee, which was appointed by and reported to the general meeting of the association, was distinct and different in its nature from the committee which came into existence in June 1868. Mr. Ellissen, as secretary of the latter, wrote and sent to Lord Stanley, then Her Majesty's Secretary of State for Foreign Affairs, in August and September, 1868, certain letters, of which the object seems to have been to enlist such influence as the English government might have with the Turkish government against the then council of administration of the association, or at least to prevent its being used in their favor. The letters contain imputations on the council of administration, which are couched in strong and offensive language, and of which a subsequent explanation, that the imputations were made on them in their official and not in their individual characters, seems a lame and not satisfactory withdrawal. On the 30th of September, 1868, at a general meeting of the company, a resolution was proposed requesting the directors to adopt the strongest possible measures to put a stop to the mischievous action of the committee of consultation. This, it will be understood, was a mere expression of opinion, and not a formal resolution, as the notice required by the statutes for formal resolutions had not been given. Shortly after that the council of administration instituted the proceedings already mentioned. The case was tried at the Central Criminal Court, when the jury, being unable to agree, were discharged. It was then removed by *certiorari* into the Court of Queen's Bench, and tried before a special jury with a similar result. On two other occasions it had been opened before a special jury, but without result; the proceedings remaining incomplete on one occasion, from the illness of a jurymen, and on another from 339] want of time. Of the costs incurred by *the prosecutors in those proceedings, some part had been paid before the half-yearly general meeting, held on the 31st of March, 1871, and accounts embodying that payment were sanctioned by the meeting, after attention had been expressly called to it, with no dissentient voice but that of the plaintiff; and it is not denied that the rest of the costs already incurred, as well as of those of the

further proceedings in the matter, are intended to be paid in like manner. The question raised by the bill is whether this is lawful, or whether such a payment is so inconsistent with the objects and spirit of the partnership that no majority of shareholders, however great, can bind the minority to it? Unless this is established, the Court, according to *Foss v. Harbottle* ⁽¹⁾, would decline to interfere. The association in this case is one of which the rights of members as between themselves must be taken to be governed by Turkish law. The association is created by the Sultan's firman, and regulated by statutes which were submitted to, and sanctioned by, the Turkish government. The contracts of the shareholders were, no doubt, actually executed in various places; but the bond between them was intended to be Turkish, and the corporation was to have its seat in the Turkish dominions, and to carry on its operations there, though its governing body was to be in England. The rights of the members of the association as between themselves are therefore to be determined by the Turkish law. How the courts of England act in construing a foreign contract or other document is laid down by Lord Cranworth in *Di Sora v. Phillips* ⁽²⁾. Lord Cranworth says: "What are the rules by which an English Court ought to be governed in construing a foreign contract? When a written contract is made in a foreign country, and in a foreign language, the Court, in order to interpret it, must first obtain a translation of the instrument; secondly, an explanation of the terms of art, if it contains any; thirdly, evidence of any foreign law applicable to the case; and, fourthly, evidence of any peculiar rules of construction, if any such rules exist, by the foreign law. With this assistance the Court must interpret the contract itself on ordinary principles of construction." And those rules are explained to the same effect, but more fully in the judgment of the Vice-Chancellor in the same case ⁽³⁾. The principle *of jurisprudence which I am asked here to ap- [340] ply is, that the governing body of a corporation, that is in fact a trading partnership, cannot, in general, use the funds of the community for any purpose other than those for which they were contributed. By the governing body I do not, of course, mean exclusively either directors or a general council; but the ultimate authority within the society itself, which would ordinarily be a majority, at a general meeting. According to the principle in question, the special powers, given either to the directors or to a majority, by the statutes or other constituent documents of the association, however absolute in terms, are always to be construed as subject to a paramount and inherent restriction that they are to be exercised in subjection to the spe-

⁽¹⁾ 2 Hare, 461.⁽²⁾ 10 H. L. C., 624, 633.⁽³⁾ 10 H. L. C., 629.

cial purposes of the original bond of association. This is not a mere canon of English municipal law, but a great and broad principle which must be taken, in absence of proof to the contrary, as part of any given system of jurisprudence. Possibly in this or that system the line may be drawn more or less sharply by decisions. It is difficult to conceive any system of jurisprudence in which *Natusch v. Irving* ⁽¹⁾ would have been differently decided; though not difficult, perhaps, to conceive that foreign tribunals might have come to a different conclusion in some of the cases in which English Courts have restrained the acts of incorporated partnerships as being *ultra vires*. But though the rights which I have to deal with are rights regulated by Turkish law, the general principle assumed to be common to all systems must be applied by me in the way in which I find it to have been applied by the English Courts. The case would be otherwise if it were shown that the course and habit of Turkish Courts has been to apply it differently. It cannot be right to say that the principle is universal; but that a particular application of it is particular and municipal, unless and until the fact is proved. In this case there is no evidence of the foreign law on the point; and it follows from what I have said, that the question must be decided here exactly as it would have been decided if this had been a purely English company. It seems to me that where a *quasi* partnership of this sort is divided into a majority and minority who differ on a question of internal administration, and 341] litigation results from *the difference, it is contrary to the spirit of the partnership to pay the expense of the litigation out of the general fund; and that this is independent of the question whether the majority is overwhelming or a bare majority. Of course any shareholder, or number of shareholders, may deal with the company as a stranger, and litigation arising out of such dealings will none the less be the act of the company as a whole, because it is against a member or members of it. And it may be difficult to say exactly where the line runs in such a case; as, for example, in *Kernaghan v. Williams* ⁽²⁾, which was cited in the argument. But the proposition stated above seems to me, nevertheless, to be *prima facie* true. It is said that in this case the litigation was intended indirectly to benefit, and did actually benefit, the company as a company seeking to attain its proper and legitimate objects. That could probably be said with almost equal truth wherever the object and effect of the litigation is to silence the minority and leave the majority supreme. In this case the indictment was avowedly intended to prevent the minority from objecting to the course taken by the general council (supported by a majority) in dealing with the

⁽¹⁾ 2 Coop. C. C., 358.

⁽²⁾ Law Rep. 6 Eq., 228.

company's funds; or, in other words, to preclude the action of the minority as dissentients. Had that action been confined to what may be called constitutional opposition, and had the attempt been to silence that, the question whether the costs of a litigation with such an object could be paid out of the general funds of the association would not have been arguable; and I think that the form of opposition, whether by appeal to the public, or to the Turkish government, or to the English government as having influence on the Turkish government, affords no satisfactory ground of distinction. The question which was right and which was wrong on the point at issue, or even that of the propriety of the particular mode of raising it, or of that adopted for stopping the discussion, seems to me immaterial. I hold, therefore, that the plaintiff is substantially right in his contention, that the payment of these costs is *ultra vires* of the majority.

It remains to consider whether the directors should be personally decreed to refund what has been already paid in respect of them. *That the position of the directors in an asso- [342 ciation like this is fiduciary cannot be doubted; and that the Court might compel the refunding by them to the company of money misapplied by them, though in no way appropriated to their own use or for their own purposes, is clear. But unquestionably the position of directors in this respect is very different from that of ordinary trustees. I see no reason to doubt that these directors, or the majority of them who acted in the matter, sincerely believed that in doing what they did they were giving effect to the informally expressed but palpable wishes of a large majority of their constituents, whom it was their *prima facie* duty to obey; and that they acted in good faith, without knowledge or suspicion, that it would be unlawful for them to seek from the company's funds indemnity for their expenses incurred in the company's service. All that, however, would amount to little or nothing if the question was as to the replacing of a trust fund lost by the honest mistake of a trustee, properly so called; but it is very material when the question is whether the Court is actually bound to decree repayment by *quasi* trustees of a sum, which, though not inconsiderable to individuals, can only benefit infinitesimally the comparatively few shareholders entitled to complain of it. I think the Court is not so bound in every case where directors have spent money in error; and, in fact, although these cases have been very common, a decree for such a repayment has been rarely made. In any case, I should not, I think, have disturbed payments made before the bill was filed; but it seems better to disturb none. The decree will, therefore, be confined to a perpetual injunction as prayed;

and, thinking as I do, that the point was not expressly governed by any reported case, unless *Kernaghan v. Williams* ⁽¹⁾ be an exception, that the alleged libels were unjustifiable in tone, even if justifiable in substance, and that the plaintiff's position is not quite that of a disinterested shareholder complaining that the spirit of the association is violated by the proceedings in question, no costs will be given.

Solicitors for the plaintiff: Messrs. *Elmslie, Forsyth, & Sedgwick*.

Solicitor for the defendants: Mr. *George Rooper*.

May 25, 1873, V.-C.W.

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*BROWNE v. HOPE.

[Law Reports, 14 Equity Cases, 343.]

[1873 B. 112.]

Will—Gift of Residue to Legatees named, and to their Executors, Administrators, and Assigns—Declaration that the Shares should be vested on Execution of Will—Death of Legatee before Testator—Lapse.

Testator gave, by will, the residue of his estate to trustees to pay and transfer the same unto seven legatees named, in equal shares as tenants in common, and their respective executors, administrators, and assigns, to whom he bequeathed the same accordingly; and he declared that such shares should be vested interests in each legatee immediately upon the execution thereof, and that the shares of the married women should be for their separate use:

Held, on demurrer, that the share of one of the legatees—a married woman—who died after the date of the will but before the testator, did not belong to her husband, her legal personal representative, but that it had lapsed.

THE Rev. William George Sawyer, by will dated the 23d of November, 1869, after making certain specific bequests, and giving and devising real and personal estates to trustees for sale and conversion, and after directing payment out of the proceeds of sale and conversion of other legacies, and some annuities, devised a messuage, and land, and hereditaments, at Old Dalby, Leicestershire, unto and to the use of the Rev. Robert Coalbank and his successors, incumbents or ministers of the church of Old Dalby, and he declared that as to the residue of the moneys to arise from the sale and conversion of his said real and personal estates, "My trustees or trustee shall pay and transfer the same unto Charles Hope; Eliza, the wife of Andrew Inglis; Catherine Hope, and Louisa Hope" (the four children of General Frederick Hope), "and to Selina, the wife of Thomas Edmund Franklin; Charlotte, the wife of the Rev. Samuel Benjamin Browne, of Hope Mansell; and Fanny Hope" (the three children of Captain George Hope); "in equal seventh shares, as tenants in common, and to their respective executors, administrators, and assigns, to whom I bequeath the same accordingly; and I

⁽¹⁾ Law Rep. 6 Eq., 228.

declare that such shares shall be vested interests in each of my said residuary legatees, immediately upon the execution hereof, and that the shares of such of them as are married women shall be for their own sole and separate use and disposal, and be free from the debts, control, or interference of their respective husbands."

*By a codicil dated in July, 1870, the testator devised [344 the advowson of the vicarage of Old Dalby to trustees upon trust to induct the Rev. Robert Coalbank, whom he described as "the now curate or assistant minister" of the church of Old Dalby, if he should be living at the testator's death, and after referring to the devise in his will to the Rev. Robert Coalbank, the testator said, "I hereby declare that the said devise of the messuage, land, and hereditaments, was intended to operate, and shall take effect, as if the said Robert Coalbank had previously to my death been appointed and inducted into the said vicarage of Old Dalby."

The testator died in May, 1871. Charlotte, the wife of the Rev. S. B. Browne, died in September, 1870, and he, as her legal personal representative, filed this bill, praying for a declaration as to the rights and interests of the several parties in the one-seventh part of the residuary estate which was primarily intended for the said Charlotte Browne, and for consequential relief.

The cause came on to be heard on a general demurrer for want of equity by the first two defendants, who were respectively the sole next of kin and the heir at law of the testator.

The *Solicitor General* (Sir *G. Jessel*), and Mr. *Cadman Jones*, for the demurring defendants:

The object of this demurrer is to obtain a declaration that the plaintiff has no title under the will to the one-seventh share which was given to his wife who died in the testator's lifetime. The plaintiff insists that there was no lapse; but the use of the words "executors, administrators, and assigns," does not prevent a lapse. It is also insisted that this was a vested interest, in consequence of the use of the words "immediately upon the execution hereof;" but no one can take an interest under a will until the person who makes it be dead. There can be no vesting earlier than that event. The law is well and strictly settled as regards lapse. There must be clear words to prevent it, and there is nothing in this will to prevent the ordinary doctrine applying.

Sir *Roundell Palmer*, Q.C., and Mr. *Horton Smith*, for the plaintiff:

The question is, whether the testator has sufficiently shown an *intention that there should be no lapse, but that the exe- [345

cutors or administrators should take, in the event of death in his lifetime, and it is submitted that both on principle and authority he has done so. It is suggested, that the words "immediately upon the execution hereof," do not mean what they say. For what purpose were those words used? The gifts were not to persons contingently as to a class; nor upon the fulfilment of a condition, such as marriage or age, or the like. The gifts were immediate and absolute; for the testator said, "I declare that such shares shall be vested interests in each of my said residuary legatees immediately upon the execution hereof." The gifts were not only to individuals, but to them and to their executors, administrators, and assigns, to whom he "bequeathed the same accordingly." If the construction suggested for the demurring defendants be adopted, these latter words will be rendered nugatory. The language of the codicil in reference to the advowson evidently shows that the testator desired to secure the legal fulfilment of his object—that all the gifts should take effect as if they vested upon his death. The intention is expressed in words equally as clear in *Sibley v. Cook* ⁽¹⁾, where the gift was to the legatee and "to her executors or administrators," and it was held that the legacy did not lapse. In that case the words were negative; here they are affirmative. In *Sibthorp v. Moxom* ⁽²⁾, there was the same result, and the words here—the sole question being one of intention—are at least as strong, if they are not stronger than in that case. The same principle was acted upon in *Philips v. Philips* ⁽³⁾, and in *Bridge v. Abbot* ⁽⁴⁾, where there is an allusion to *Sibley v. Cook*. The precise object of the testator will be accomplished by the construction which the plaintiff contends for; i. e., that there is no lapse, but that the executors, administrators, or assigns take the gift as part of the estate of the deceased legatee whom they represent; the intention being to add it to her estate. A gift to executors and administrators is not to be read as a gift to next of kin: *Daniel v. Dudley* ⁽⁵⁾. In that case there was a marriage settlement, and the property passed to the legal representative of the wife. *Attorney-General v. Malkin* ⁽⁶⁾, *Mackenzie* 346] v. **Mackenzie* ⁽⁷⁾, and *Re Seymour's Trusts* ⁽⁸⁾, are cases also in point, and so is that of *Long v. Watkinson* ⁽⁹⁾, and it is submitted that the plaintiff's contention is a perfectly consistent and rational one. If the words can be construed as showing an intention to substitute the executors, administrators, or assigns in case of death—the purpose being clear and the means of accomplishing it—why should the Court be astute to defeat

(1) 3 Atk., 572.

(2) Ibid., 580.

(3) 3 Hare, 281.

(4) 3 Bro. C. C., 224.

(5) 1 Ph. 1.

(6) 2 Ibid., 64.

(7) 3 Mac. & G., 559.

(8) Joh., 472.

(9) 17 Beav., 471.

it? The gift in this case is to the legatees "and to their respective executors, administrators, and assigns."

But the addition of the word "assigns" is immaterial. It primarily indicates assigns after death; but it is not unreasonable to say that a legatee is an assign. One of these legatees may have entered into a contract, and it follows from the decisions in *Long v. Watkinson* and *Daniel v. Dudley* ⁽¹⁾, that the legacy would be liable to all the dealings with it by the person to whom it was given. In either case the construction is the same: *Graffley v. Humpage* ⁽²⁾; *Holloway v. Clarkson* ⁽³⁾; *In re Watton's Estate* ⁽⁴⁾.

The use of the word "assigns" is simply corroborative of the plain intention of the testator that there should be no lapse, and therefore it is submitted that the plaintiff, as the legal personal representative of his deceased wife, is entitled.

[They also referred to *Corbyn v. French* ⁽⁵⁾.

The Solicitor-General, in reply:

There must be two things: a clear intention that there shall not be a lapse, and a clear indication of the person to take in case of prior death.

Corbyn v. French is not in the plaintiff's favor. There is not that clear indication upon the face of this will which is requisite. In *Sibley v. Cook* ⁽⁶⁾, there was a gift, in case any of the legatees should die, to the executors and administrators. It may be doubted, however, whether that case is, upon the whole, an authority in this one; and it must be observed that the [347 decision in that case was upon the authority of *Darrel v. Molesworth* ⁽⁷⁾, which, it is submitted, has been overruled. A mere declaration that there shall be no lapse is not sufficient. It does not, by implication give it to somebody else.

[He cited *Williams on Executors* ⁽⁸⁾ and *Toplis v. Baker* ⁽⁹⁾.]

SIR JOHN WICKENS, V.C.:

It is, I think, quite clear, that a testator may prevent a legacy from lapsing; but the authorities show that in order to do that he must do two things: he must, in clear words, exclude lapse; and he must clearly indicate who is to take in case the legatee should die in his lifetime. The first part of the gift in this case, in which, it may be observed, there are unnecessary words of limitation, would unquestionably not exclude lapse. Even if the words in reference to the vesting of the interests were a sufficiently clear indication of intention that there should be no lapse, yet they only supply the first of the two requisites, and consequently the second must be supplied, if at all, by extracting

⁽¹⁾ 1 Ph. 1.

⁽²⁾ 1 Beav., 46-52.

⁽³⁾ 2 Hare, 521.

⁽⁴⁾ 8 D. M. & G., 173.

⁽⁵⁾ 4 Ves., 418.

⁽⁶⁾ 3 Atk., 572.

⁽⁷⁾ 2 Vern. 378.

⁽⁸⁾ Vol. ii. 6th Ed., 1123.

⁽⁹⁾ 2 Cox, 118.

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from the superfluous but not unusual words in the first part of the gift something to import into the second a substitution, in case of the legatee's death in the testator's lifetime. I think that that would be an entirely unsound construction, and therefore I must allow the demurrer.

Solicitors for the plaintiff: Messrs. *Ravencroft & Hills*.

Solicitors for the demurring defendants: Messrs. *Tucker & Lake*.

V.-C.W. May 30, 1872.

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[Law Reports, 14 Equity Cases. 348.

1872 R. 61.

Trade Name — "*Leopoldshall*" — *Injunction*.

The name of the place of origin of an article may become a trade mark consideration of the kind of evidence necessary to support an interlocutory injunction in such a case.

MOTION. In 1859 the Ducal government of Anhalt discovered at Leopoldshall, in the territory of the duchy, near the Prussian town of Stassfurt, a valuable mine of rock salts, containing in particular a crude or native salt called "*Kainit*," peculiarly rich in sulphate of potash, and thereby and otherwise very valuable as a manure. In August, 1869, the plaintiffs analysed it, and published in England and Ireland, a circular, bringing it under the notice of the public by the name of "*Kainit*" alone. Shortly before the 30th of April, 1870, the Ducal government granted the exclusive right of exporting over the sea genuine *Kainit* out of the mines to Mr. Gustav Ziegler. On the 30th of April, 1870, the notification of that grant was published, and on the same day Gustav Ziegler conferred such exclusive right upon the plaintiff Otto Radde. The government notification and memorandum conferring such exclusive right on the plaintiff, Otto Radde, was as follows:

(Translation.)

"Notice is hereby given, that the Ducal Anhalt government department for forests and mines have awarded to Mr. Gustav Ziegler, of Dessau, the exclusive right of exporting over the sea genuine *Kainit*, in its raw, ground, or unground state, wrought and gotten out of the Ducal mines at Leopoldshall, and have closed an especial contract to this effect with Mr. Gustav Ziegler.

"Dessau, April 30th, 1870."

"The Ducal Anhalt government department of forests and mines,

"Steinkopff.

"Memorandum.

"Referring to the above notice, I hereby confer upon Mr. Otto
349] *Radde, of Hamburg, the exclusive right of exporting

genuine Kainit from Leopoldshall over the sea, especially to Great Britain and Ireland. "G. Ziegler."

The translation of the notification and memorandum were, in the month of July, 1870, printed and circulated by the plaintiffs in this country. In that circular the word "Leopoldshall" was placed in a single line in large type, and the circular particularly referred to "the genuine Kainit" as coming from the Ducal mines at Leopoldshall. In 1869, when Kainit was first introduced, no one was offering or selling an article under that name; but spurious imitations having afterwards appeared, the plaintiffs thereupon adopted the distinctive name "Leopoldshall" for the Kainit supplied by them. The plaintiff Otto Radde, acting under his aforesaid rights, exported large quantities of the genuine Leopoldshall Kainit to the United Kingdom, and, in co-operation with the plaintiff Emil Meyerstein, his agent here, established a profitable sale for his Kainit. Before the filing of the bill in this suit they had distributed 127,000 circulars and books of various kinds relating to it; had advertised it almost constantly in more than thirty newspapers; and had sold about £500 worth by March, 1870, £15,000 worth by the end of that year, and £30,000 worth in 1871. In June, 1870, the plaintiffs circulated a "caution," stating the sole right of the plaintiff Otto Radde, and warning all persons against selling the genuine Leopoldshall Kainit without a license. Ever since June, 1870, the plaintiffs had always advertised and sold their Kainit as "genuine Leopoldshall Kainit." It was imported and used as a crude salt in its native state, being only ground fine for the purpose of sowing it on the land. It contained from 24 to 32.60 per cent. of sulphate of potash, the guaranteed minimum being 23 per cent.; and contained also sulphate of lime, sulphate of magnesia, chloride of magnesium, and common salt. It was a most valuable manure, especially for light soils, when used in combination with nitrogenous and ammoniacal manures. The native salt did not deliquesce, and might therefore be stored without inconvenience. The Leopoldshall mines were the only mines where the genuine native Kainit could be obtained in sufficient and regular supplies. Many inferior salts and compounds had been introduced and sold under the title of [350 "Kainit," but "the genuine Leopoldshall Kainit," imported by the plaintiffs exclusively, was well known in the trade as the product of the Leopoldshall mines; was distinguished by the name "Leopoldshall" from all other kinds of Kainit; and the plaintiffs claimed an exclusive right to the use of the word "Leopoldshall" as applied to Kainit.

In March, 1872, the defendants issued the following circular or document:

"Kainit. [*Leopoldsalt*.]

"We are offering a good lot of above, testing 24 per cent. sulphate of potash, at £3 per ton, net cash, free to carriers in bags, and shall be glad of orders per return.

"*Norman & Pigott*.

"37, The Albany, Old Hall Street, Liverpool,

14th February 1872."

On the 22d of March, 1872, Thomas Pugh, a customer of the plaintiffs, wrote to the defendants as follows:

"Please send me sample, analysis report, and price per ton on rails in bags for Leopoldshall Kainit."

On the 23d of March, the defendants sent the following answer to that letter:

"Mr. Thomas Pugh.

"Dear Sir,—In reply to your esteemed favor, we beg to quote inclosed sample Leopoldsalt Kainit, £3 per ton in bags per rail, net cash, and shall be glad of orders.

"Yours truly,

"*Norman & Pigott*.

"(Turn over).

"We have no further guaranty than the test, which is 24 per cent. sulphate of potash."

The plaintiffs alleged that the article so brought into the market and sold by the defendants was very inferior in quality to the genuine Leopoldshall Kainit; that it could not be sold except by means of deceiving the public and injuring the plaintiffs; that the plaintiffs had in fact sustained considerable pecuniary loss by such sale; and that, as no person, except the plaintiff Otto Radde, had any right to export genuine crude Kainit from Leopoldshall over the sea, the genuine article could not be obtained *in this country (except by means of fraud) from any person but the plaintiffs, and persons by them lawfully authorised. The plaintiffs had not, nor had either of them, ever given any consent to the defendants, or either of them, to sell Kainit, or use the word Leopoldshall.

The cause came on to be heard on a motion for an injunction to restrain the defendants from issuing or circulating the aforesaid circulars, or any similar circulars or documents, and from using the words Leopoldsalt or Leopoldshall, or any colorable imitation of Leopoldshall, in connection with Kainit brought into the market by them; and generally from doing any act or thing representing or calculated to induce the belief that the Kainit offered for sale by the defendants was the product of the Leopoldshall mines, or was the Kainit imported by the plaintiffs into this country. The plaintiffs' evidence was an echo of the bill in the suit, and to the effect above stated.

The defendants deposed that the Kainit which they offered

for sale was purchased by them in the market as genuine Leopoldshall Kainit, and that they intended to sell it as such; that the word Leopoldsalt in their circular and letter was a mere oversight occasioned by their want of familiarity with the German language, and by the fact that the article sold was a salt. They said they fully believed it to come, and intended to sell it as coming from the Leopoldshall mines, in the Duchy of Anhalt. The Leopoldshall Kainit was an article of trade both in England and on the continent. In the list of the current prices at Hamburg on the 6th of May, 1872, Leopoldshall Kainit was included, and, as they believe, was commonly included in documents of the like nature. They further said that they purchased their Leopoldshall Kainit in good faith; that they were informed and believed that whereas the alleged right of the plaintiffs extended only to the exportation of Kainit in its raw state, any subjects of the Ducal Anhalt Government were at liberty to export it in its calcined or manufactured state; and that the plaintiffs had no exclusive right to the Kainit wrought or gotten from the said Ducal mines; but that, on the contrary, the Ducal Government was under contracts to supply the same to many other firms in the Duchy. They believed that the Kainit which they offered for sale in manner aforesaid *was [352 genuine Leopoldshall Kainit in a calcined or manufactured state; and they never either intended to sell or did in fact sell it as being the plaintiffs' genuine Leopoldshall Kainit. They believed that there was, in fact, a considerable quantity of genuine Leopoldshall Kainit in the English market (both in a manufactured and in a raw state) not exported by the plaintiffs. The defendants, in the earlier portions of their evidence, deposed to their want of knowledge of the plaintiff Otto Radde's title; but the statements then made by them were subsequently amended.

The plaintiffs, in reply, stated that there never had been any genuine Leopoldshall Kainit in the English market not exported by the plaintiffs; and that such an article always had been and was unknown in the market; that if the plaintiffs had ever become aware of the sale of such an article, they would at once have taken measures to restrain the sale; and they also stated that Leopoldshall was the name of a mine only, and was not a district or town, or even a village.

Mr. Karlake, Q.C., and Mr. Colt. for the plaintiffs:—

The first question in this case is, Is the word "Leopoldshall" a trade-mark? We say it is: *M'Andrew v. Bassett* (1); *Wotherpoon v. Currie* (2); *Joyce on Injunctions* (2). The second ques-

(1) 83 L. J. (Ch.), 561.

(2) Vol. i., 246.

(3) Law Rep. 5 H. L., 508.

tion is, Have the plaintiffs the exclusive or sole right of "selling" their Kainit in this country? The evidence shows that long ago the plaintiffs' industry enabled them, and them alone, to procure from the Leopoldshall mine Kainit in a crude state. They then also obtained a grant of the exclusive right to export that article from Anhalt, and to import it into this country. Those facts establish their absolute ownership of the genuine crude Kainit in this country as against every one else. They have, therefore, a perfect right to prevent any one from selling what purports to be their Kainit. To achieve that they use the word "Leopoldshall." It will inflict no hardship on the defendants to grant this injunction, because they can easily so describe any Kainit sold by them as not to interfere with the "genuine Leopoldshall Kainit" sold by the plaintiffs.

353] *The last question is, have the defendants infringed the trademark of the plaintiffs? Their circular shows that they have. It was evidently framed for the purpose of deceiving the public. The word "Leopoldsalt," was intended as, and is a close and colorable imitation of Leopoldshall, and is meant to lead buyers to suppose that they are purchasing the genuine native salt obtained from the mine at Leopoldshall. Unless such be the intention, the use of the word "Leopold" is wholly unmeaning and cannot be accounted for. The defendants' letter of the 23d of March, 1872, was written in reply to an application for Leopoldshall Kainit, which such reply treats as the same article as Leopoldsalt Kainit." The expressions as to the guaranty in the letter show clearly that the thing to be guaranteed was — that the article sold was — Kainit from the Leopoldshall mine, which commonly contains the minimum proportion of 24 per cent. of sulphate of potash, and is well known in the trade. Resting our case merely on *M'Andrew v. Bassett* ⁽¹⁾, the plaintiffs are clearly entitled to an injunction.

Mr. *Greene*, Q.C., and Mr. *B. B. Rogers*, for defendants:

The plaintiffs here seek to carry the doctrines of this Court far beyond their proper limit; and the cases cited do not apply to the present one. The defendants' case is, that the Kainit which they sold was bought by them in the market as genuine Leopoldshall Kainit; that they intended to sell it as such; and that the use of the word "Leopoldsalt" was the result of inadvertence on their part. They say that they "fully believed, and fully believe it to come, and intended to sell it as coming, from the Leopoldshall mine in Anhalt." Unless the plaintiffs can show *mala fides* on the part of the defendants, the injunction cannot be granted; but it is impossible to gainsay the *bona fides* of the defendants.

⁽¹⁾ 33 L. J., (Ch.) 561.

[The VICE-CHANCELLOR:—Why do they not say precisely where in fact they got the Kainit which they sold?]

They do say where they got it, viz., in the market. But the plaintiffs have not shown a proper title to their Kainit. It is not, as here, alleged on the pleadings that their Kainit can only be got at the Ducal mines, nor do they say that the defendants' is *not from Leopoldshall, i. e., the same "place." If it [354 is, there is no deception on their part; and if it is not, the plaintiffs have no case.

Then, again, the plaintiffs are selling the raw or crude Kainit; the defendants are selling the calcined or manufactured article. What they are selling is not, therefore, the same thing as that which the plaintiffs (even on their own showing) profess to import into this country. The calcined or manufactured article can be bought abroad at any moment; and if so, there is nothing to prevent its being sold here.

Wotherspoon v. Currie ⁽¹⁾ is distinguishable from this case. "Starch" is the same thing everywhere all over the world; but the plaintiffs cannot pretend that they have so large a title as that to their Kainit. *M'Andrew v. Bassett* ⁽²⁾ is a different case. If the plaintiffs here are right, the defendants must, although their description of their own article denotes correctly what it is, add other words to show that "it is not the Kainit of Otto Radde." But that is never required in these cases.

Then the evidence here proves, beyond a doubt, that the public have never really been deceived by the articles sold by the defendants. The defendants never have used the plaintiff's trade mark, even if the word "genuine" imports "crude." There has been no infringement of it by the defendants; they have never used that word, but have throughout adopted their own description, and not that of the plaintiffs. Moreover, it is a well known fact that many other merchants have long sold and still sell with impunity the same sort of article as the defendants. Unless, therefore, the plaintiffs can prove that what the defendants do sell is in all respects identical with the plaintiffs' "crude Kainit," there is no ground for an injunction. In fine, we say the plaintiffs have not proved that the Kainit of the defendants does not come from these mines; and even if they had proved that, they would not have been entitled to the order they now move for.

SIR JOHN WICKENS, V.C. :

The plaintiffs seem to me to have established a *prima facie* case to treat Leopoldshall as denoting in the English market the *unadulterated article imported by M. Radde. No doubt [355

⁽¹⁾ Law Rep. 5 H. L., 508.

⁽²⁾ 33 L. J., (Ch.) 561.

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that is a very difficult sort of title to establish, and it is not necessary now to say that it is definitively established. That is a matter for the hearing. But the evidence before me of practical men and persons engaged in the trade is substantially uncontradicted, as I understand it, and is of unusual strength. The defendants have clearly used the name of Leopoldshall, or an imitation of it; and have not attempted to show, or at any rate have not shown, that they had any excuse whatever for so doing. There is nothing in the evidence that I can see to lead to a serious belief that they have used this name *bonâ fide*. Their evidence upon the point really comes to nothing. It is utterly vague as to the persons from whom, the times at which, and the representations under which what they sell as Leopoldshall was purchased; and the mis-spelling of the word is, to say the least, as suspicious a circumstance as can be conceived. No doubt if they had shown that the Kainit which they offered for sale was really the Leopoldshall Kainit, or even had been bought by them under circumstances which led them to believe it was really Leopoldshall Kainit, they would have been in a very different position. But in a case of this sort, mere allegations that they purchased it as genuine Leopoldshall Kainit, or that they purchased it in good faith, or that they believed it to come from the Leopoldshall mine in a calcined or in a manufactured state, must go for nothing. I must treat the case, therefore, as one in which the plaintiffs have established *primâ facie* what I admit to be a very difficult title to establish, a title to the exclusive use of a particular word as a trade-mark; and that the defendants have used the same word without any justification or excuse. If they intended to assert by the affidavits that they were unacquainted with the plaintiff's use of the title, or his circulars or advertisements, or of the terms which he had applied to it in using the circulars and advertisements, they have certainly failed to do so distinctly. There is not a word to that effect in their first affidavits, and if the allegations as to knowledge in their second affidavits are intended to convey that, it is very unfortunately expressed. Unquestionably the deponents knew in 1869 that Radde professed, whether rightly or wrongly, to be the only shipper of genuine Leopoldshall Kainit, although the state-
356] ment in terms *seems to deny that; and it may therefore well be that other things are true which the same allegation seems *primâ facie* to deny. It is quite obvious that much less absolute proof of the plaintiffs' title is required where there is reason to doubt the defendants' good faith. Here they swear to that good faith in so many words, but give the Court no reason whatever to believe in it; and certainly considerable reason for doubting it. No doubt the plaintiff's title, although

much more satisfactorily proved than it was when a previous case ⁽¹⁾, founded upon the same or a similar title, was before me, may still be open to much question. I by no means decide that even as now proved, it would be sufficiently established as against a person who, in ignorance of any claim upon Radde's part, had sold or offered for sale raw Leopoldshall Kainit — Kainit which he had lawfully got into his possession with good reason to believe that it was what he described. But it seems to me that the title is so sufficiently established as to authorize me, on an interlocutory application, to grant an injunction against persons who, when challenged, say no more in their own favor than the defendants have said in this case. I shall therefore grant the injunction moved for; omitting, however, from the order the words "the product of the said Leopoldshall mines."

Solicitor for the Plaintiffs: Mr. T. J. Holmes.

Solicitors for the Defendants: Messrs. Cree & Last.

V. C.W. May 28, 29; June 4, 1872.

*HALL v. HALL.

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1870 H., 190.

HALL v. HALL.

1871 H., 20.

[Law Reports, 14 Equity Cases, 365.]

Real Estate—Voluntary Settlement—No Power of Revocation—Professional Advice—Subsequent Acts of Settler—Settlement relieved against.

A voluntary settlement should contain a power of revocation; if it does not, the parties who rely upon it must prove that the settler was properly advised when he executed it, that he thoroughly understood the effect of omitting the power, and that he intended it to be excluded from the settlement. If that is not established, and the Court sees, from the surrounding circumstances, that the settler believed the instrument to be revocable, it will, even after the lapse of nearly twenty years and the death of the settler, interfere and give relief against it.

THE plaintiff in the first of these suits was Lewis Hall, one of the two trustees of a voluntary settlement of real estate, and the second son of the settler and testatrix in the suits. The defendants were, Ellis Hall and some of the other children of the settler; Matthew William Thompson, a purchaser of a portion of the settled property and others.

The plaintiffs in the second suit were the three infant children of Ellis Hall, by Joseph Hobson, their next friend; and the defendants were Lewis Hall and others, and the trustees of the testatrix's will.

⁽¹⁾ *Radde v. Knoblauch*, May 22, 1872.

To the contrary in effect, see *Canal Company v. Clark*, 13 Wallace, 311.

The facts common to the two suits were the following:

In 1852 Eliza Hall, widow, was seised in fee, free from incumbrances, of certain hereditaments and premises in Yorkshire. She then had seven children, viz., John Hall, Lewis Hall, Edwin Hall, Ruth Hall the elder, Sophia Hall (now Sophia Green), Jesse Hall (since deceased), and Ellis Hall. She was desirous of making some provision for them. She had at that time a great dislike to making a will, and she accordingly instructed Mr. George Humble, a solicitor, of Bradford, to settle the property on herself and her children; the rents to be reserved to herself for life, then to be divided amongst her children until 366] they were all of age, when the *property was to be sold and the money divided equally; and the trustees of the settlement were to have power to sell the property at any time with her consent.

By the settlement, dated the 24th of December, 1852, expressed to be made between Eliza Hall of the one part, and Lewis Hall and George Alderson of the other part, and executed by Eliza Hall, after reciting that Eliza Hall was desirous of settling and assuring the hereditaments and premises therein after described, and intended to be thereby conveyed in the manner thereinafter mentioned, it was witnessed that, for effectuating such desire, and for the nominal consideration therein mentioned, she (Eliza Hall) thereby granted and conveyed to Lewis Hall and George Alderson, and their heirs, the hereditaments and premises therein described and hereinbefore referred to, to hold the same to them, their heirs and assigns, upon trust to pay the rents and profits thereof, to Eliza Hall for her life, for her sole and separate use (her receipts to be good discharges for the same); and from and after her decease to pay the same rents and profits to Sophia Hall, Jesse Hall, and Ellis Hall, or apply the same for or towards their maintenance and education during their respective minorities; and when the youngest should attain the age of twenty-one years (the said Eliza Hall being then dead), upon trust to sell and dispose of the said hereditaments and premises in manner therein mentioned; and then upon trust, after reimbursing themselves their costs and expenses out of the purchase money, to pay and divide the residue or surplus thereof unto and amongst the said John Hall, Lewis Hall, Edwin Hall, Ruth Hall the elder, Sophia Hall, Jesse Hall, and Ellis Hall, their executors and administrators, in equal shares and proportions, as tenants in common.

The settlement then contained a proviso giving the children and their issue such benefit of survivorship as was therein mentioned; a covenant for further assurance on the part of Eliza Hall; the usual trustees' receipt and indemnity clauses; and a

power for the appointment of new trustees; but no memorial of the settlement was duly registered on the 1st of January, 1853.

In October, 1861, the settler, without the knowledge of the trustees of the settlement, or either of them, mortgaged the settled property to a Mrs. Matthe secure the repayment of £200 and interest. The mortgage was duly registered. It contained, however, no reference to the settlement; and the equity of redemption was reserved to the mortgagor herself.

The settler, by her will, dated the 27th of May, 1861, directed that all her debts, funeral and testamentary should be paid out of her personal estate, devised therein described as the market tavern [being part of the settled property], to Ellis Hall for his life; and after his death she devised the same premises unto and equally amongst every the child and children of her son Ellis Hall who should be living at her decease, and to the issue of such child or children if he or she should die without issue; and if any of them should be then dead leaving issue; such issue taking the share which their respective parents would have been entitled to if they had been then living. She devised the premises therein described as the butcher's shop and house [also part of the settled property] unto her son Ellis Hall for his life, and to his heirs and assigns for ever, if he should return to claim the same within twenty-one years then next ensuing; and if he should not return to claim those premises within the said term of twenty-one years then she devised the butcher's shop and slaughterhouse and equally between and amongst her two sons, Ellis Hall, and to their respective heirs and assigns as joint tenants in common and not as joint tenants. She devised the other premises therein described as the Crick [also part of the settled property], unto her son Ellis Hall for his life, and to his heirs and assigns for ever, subject, nevertheless, to the payment of the said mortgage debt (which had been repaid by the sum of £130), and all interest to become payable for the same; and she devised the three other messuages therein described [also part of the settled property], with the appurtenances thereto, unto Edwin Hall and Ellis Hall, and also all the residue of her real estate [the residue, in fact, of the settled property], unto Edwin Hall and Ellis Hall, amongst other things, to pay an annuity of £20 16s. to Sophia Green for her separate use for her life, and of £7 16s. per annum to Ruth Hall the elder for her separate use; and, subject to and charged with the said mortgage debt, she devised the said real estate unto the trustees therein mentioned, but which are not material.

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be here stated; and appointed her sons Edwin Hall and Ellis Hall trustees and executors of her will.

The testatrix made a codicil to her will, by which she substituted Samuel Lupton as a trustee instead of Edwin Hall.

She died on the 30th of June, 1866, and her will and codicil were duly proved by the executors on the 18th of July, 1866.

Shortly after the death of the testatrix Lewis Hall made diligent inquiries and searches for, and endeavored to obtain possession of the settlement, in order to execute the trusts of it, but was unable to do so, and was informed that it had been destroyed by the settler.

On the death of the testatrix Ellis Hall entered into the possession of the property devised to him for his life; Edwin Hall entered into the possession of that devised to him in fee, subject to the mortgage debt; and Edwin Hall and Ellis Hall entered into the receipt of the rents and profits of that devised to them in fee, in the event of Jesse Hall not returning to England and claiming the same.

Ellis Hall and Samuel Lupton duly entered into the possession of the residuary real estate of the testatrix devised to them upon trust as aforesaid; and paid out of the rents and profits thereof the annuities of £20 16s. and £7 16s. to Sophia Green and Ruth Hall the elder respectively.

On the 1st of August, 1867, Edwin Hall and the mortgagee, sold and conveyed a part of the settled and devised property, called the Cricketers' Arms Inn, to Matthew William Thompson for £600; but with notice of the settlement.

On the 16th of October, 1869, Edwin Hall executed a deed, which was duly registered under the 192d section of the Bankruptcy Act, 1861.

There was some conflict of evidence as to the knowledge possessed by the settler, when she executed the settlement, and the precise circumstances under which she destroyed it; but the facts stated in the pleadings were as follow:

After the execution of the settlement the settler retained it in her own possession, with the exception of a short time, during which it was alleged that Lewis Hall had it in his custody.

369] *She received the rents and profits of the property during the whole of her life; and continued in the sole management and disposal of the property, and acted in such management and disposal without any reference to or the concurrence of the trustees therein named, or either of them. She so acted under the impression and belief that the settlement was revocable by her at any time, at her sole will; and that she had not thereby in any manner fettered or derogated from her full right to dispose of the same as she should think fit. Neither of the trustees of the

settlement ever acted in the trusts of it (otherwise tating the first above named suit). In October 1861, Hall, who was then very ill and confined to bed, called Mr. Humble, and directed him to prepare her will. She told him that she "had done away with that old deed of settlement." He did not then inform her that such a manner prevented from or incapable of revoking it, and he accordingly prepared, and she executed it, which, however, was afterwards revoked. Some time in 1862, or 1863, the settler with whom Ellis Hall was took the settlement out of the chest of drawers in which he used to keep the same, and handed it to Ellis Hall, at the time directing him to burn it. He accordingly, in obedience and by her direction, put the settlement into a fire, and covered it over with coals, and she and he were present when it was being burnt away. When it was consumed, she said, "There is an end of that," or used words to that effect, which evidently believed at that time not only that she had destroyed the settlement in any manner she pleased, but by destroying the same in manner aforesaid she had revoked it. She and Ellis Hall were respectively unacquainted with law; and neither she nor he was conversant with the burning of the parchment upon which the settlement was not in itself sufficient to work a revocation of the deed.

She had not, when she gave instructions for the destruction of the settlement, or at any time afterwards (save as was mentioned) any legal advice whatever, other than to Mr. Humble. He was not consulted by her as to the validity of the settlement and was not informed by her of the fact that she was about to destroy it. Under those circumstances he had no opportunity of advising her, and did not in fact advise her, or of directing the destruction of the settlement, as aforesaid did not of revocation of it.

Not only did the settlement contain no express provision for revocation by the settler, but she was not aware that such a form was requisite to enable her to revoke it. It was not for Mr. Humble to suggest to her, and he did not suggest to her, that the insertion of such a power of revocation would be requisite or advisable; and he did not in any manner call her attention to the fact that such a power, if executed as prepared, would be irrevocable; and did not take any means to discover whether the settler desired such settlement to be revocable or irrevocable.

The whole family knew of the destruction of the settlement by the settler, and regarded it as a revocation.

Jesse Hall predeceased Eliza Hall. He died a bachelor, and intestate; and no letters of administration were taken out to her estate.

Lewis Hall charged by the bill in his suit that the trusts of the settlement were in full force, and ought to be carried into execution; save in so far as such trusts might have been superseded or defeated as to such of the premises comprised in the settlement as were affected thereby by the mortgage mentioned or referred to in the will; and that inasmuch as Matthew William Thompson had full notice of the settlement and of the claim of Lewis Hall thereunder before the completion of the contract for the sale of the hereditaments and premises sold to him, he was a trustee for Lewis Hall, and his *cestuis que trust* under the settlement of the hereditaments and premises sold to him; or of so much of the purchase money of the hereditaments and premises as was not properly applied by him in discharge of the mortgage debt and interest mentioned or referred to in the will.

Lewis Hall therefore prayed (*inter alia*) by his bill for a declaration that the settlement was a valid one of the hereditaments and premises therein comprised; and that the trusts of it (subject only to the aforesaid mortgage) ought to be carried into execution; certain inquiries; accounts; the delivery up of the possession of the hereditaments and premises; a receiver; that, 371] if necessary, *the trusts of the settlement might be executed by the Court; for costs; for proper orders for the purposes aforesaid; and for further relief.

The plaintiffs in the second suit submitted that the settlement was not binding upon the settler, and that the trusts thereof ought not to be carried into execution as against the devisees under the will; but that, on the contrary, the settlement ought to be set aside by the Court.

If, however, the Court should be of opinion that the settlement was binding and ought to be carried into effect, then those plaintiffs charged that Sophia Green and Ruth Hall, the elder, ought to elect between the benefits given to them by the will and those to which they were, or claimed to be, entitled under the settlement; and that if they or either of them should elect to take against the will, then the annuities or annuity so given to them or her as aforesaid ought to be applied in or towards making good to the plaintiffs the benefits given to them by the will, and of which they would be deprived by the operation of such election.

The bill in that suit therefore prayed a declaration that the settlement was not binding upon the settler, or those claiming under her, and that the trusts of it ought not to be carried into

execution as against the devisees under her will; that the settlement might be set aside; that her will might be established by the decree of the Court; that if the Court should be of opinion that the trusts of the settlement ought to be carried into effect, Sophia Green and Ruth Hall the elder respectively might be required to elect between the benefits given to them respectively by the will, and the benefits to which they respectively claimed to be entitled under the settlement; that if they or either of them should elect to take under the will, then the property to which they or she would have been entitled under the settlement might be dealt with as directed by the will; but if they or either of them should elect to take against the will then that the benefits given to them or her by the will might be applied in or towards making good to the plaintiffs what they should have been deprived of by the operation of the settlement; that in such last-mentioned case an account might be taken of all sums of money already received on account of the annuities respectively by them or her so electing to take *against the [372 will; and that they or she might be directed to repay to the trustees what should appear to have been received by them respectively at the foot of such account; that the bill in that suit might be taken as a cross bill to that in the first suit, and that the plaintiffs might have such further or other relief as the nature of the case might require.

Mr. *Greene*, Q.C., and Mr. *Morshead*, for the plaintiff *Lewis Hall*, and his co-trustee of the settlement, stated the facts of the case, adduced evidence in support of the settlement, and combated the objections made to the admission of it.

Mr. *Miller*, Q.C., and Mr. *Vaughan Hawkins*, for *Jesse Hall* the younger, *Frederick Hall*, and *Ruth Hall* the younger, reserved their principal arguments for delivery in the cross suit.

Mr. *Lindley*, Q.C., and *F. A. Lewin*, for *Matthew William Thompson*, argued that he was improperly made a defendant in this suit. That the bill was informal as against him, and must be dismissed with costs.

They cited *Gordon v. Horsfall* ⁽¹⁾; *Doe v. Lewis* ⁽²⁾; *Troughton v. Binkes* ⁽³⁾; *Martinez v. Cooper* ⁽⁴⁾.

Mr. *Stallard*, for *Ellis Hall*.

Mr. *Greene*, in reply.

Mr. *Miller*, Q.C., and Mr. *Vaughan Hawkins*, for the plaintiffs in the second suit:

First, as to the question whether the settlement ought or ought not to be set aside:

⁽¹⁾ 11 Jur., 569.

⁽²⁾ 11 C. B., 1035.

⁽³⁾ 6 Ves., 573.

⁽⁴⁾ 2 Russ., 198.

The evidence shows that the settler did not think when she executed it that she was executing an irrevocable instrument. All the parties seem to have considered that all deeds are revocable by destruction. Here the settler clearly imagined she could do away with this deed whenever she chose; and that in 1859, when she made a first will inconsistent with it, and when 373] she had the settlement *in her possession, undestroyed, she said "I have done away with it," she must have supposed that some different disposition of her property would vacate the deed. Then, again, the family knew of the destruction of it, and treated it as a revocation. Yet they now come, or, at all events, their trustees come, to set up that settlement which they all, being *sui juris*, deliberately treated as revoked. There is in this case something more than laches; there is positive acquiescence, and they cannot be allowed so to proceed.

Second: Then as to the law:

The principles derived from the cases are these:

There are two kinds of voluntary settlements — where the object is to protect the settler against some weakness of his own; where the settlement is a mere matter of bounty on the part of the settler, or a *quasi* testamentary disposition by him. Where the primary motive is the protection of the settler the settlement should be "irrevocable." But where bounty alone is his object, or it is *quasi* testamentary, the cases show, not that a power of revocation is or is not essential to the validity of the settlement, but that the settler must be proved to have known distinctly what he was doing when he executed the instrument, and what he wished to effect by it. It must be shown, if such a power is not inserted in the deed, that the settler intended to exclude it, and was fully aware of the effect which its exclusion would produce. In the case of *Phillips v. Mullings* ⁽¹⁾ Lord Hatherley said: "Where a person is induced to execute such a deed, it must, in order to support the deed, be shown that the nature of the deed was thoroughly understood by the person executing it. But the cases have not gone further. Some cases, however, have attempted to lay down what ought to be in such an instrument. It has, for instance, been almost laid down in *Coults v. Acworth* ⁽²⁾ that where there is no power of revocation the deed will be set aside; and *Wollaston v. Tribe* ⁽³⁾ and *Everett v. Everett* ⁽⁴⁾ have been relied on as favoring the same view. But whether there should be a power of revocation or not must depend upon the circumstances; and it cannot be laid down as a general rule that such a deed would be voidable, unless it con- 374] tained a power of revocation." Now in the *present case

⁽¹⁾ Law Rep., 7 Ch., 244, 247.

⁽²⁾ Ibid. 3 Eq., 558.

⁽³⁾ Law Rep., 9 Eq., 44.

⁽⁴⁾ Ibid 10 Eq., 405.

the real ground of the cross bill is, that there was "mistake" on the part of the settler and her solicitor, who prepared the settlement. We do not allege any fraud. Our case is, that those who rely on the settlement must show that the settler was well advised as to it, and thoroughly acquainted with all its bearings, when she executed it. The evidence here shows that that was not the fact: *Naldred v. Gilham* ⁽¹⁾ and *Cecil v. Butcher* ⁽²⁾. *Nunney v. Williams* ⁽³⁾, *Phillips v. Mullings* ⁽⁴⁾, *Wollaston v. Tribe* ⁽⁵⁾, and *Everett v. Everett* ⁽⁶⁾ really seem to carry the argument to this extent: that if a power of revocation is not inserted in the deed it lies on those who support the deed to show that the settler positively declined to have it put in. *Prima facie*, therefore, every solicitor preparing such an instrument is bound to ask the settler whether he means it to be revocable or the reverse: and if the solicitor does not ask that question the deed, if made irrevocable when the reverse was intended, is, *ipso facto*, void: *Mountford v. Keene* ⁽⁷⁾. That case was, no doubt, prior to *Phillips v. Mullings*, but it is not touched by it. *Forshaw v. Welsby* ⁽⁸⁾ shows, so far as the case does go, that there is no distinction on this subject between voluntary settlements of real and personal estate.

Again, this settlement was plainly substitutional for a will, and, as such, necessarily intended to be irrevocable: *Toker v. Toker* ⁽⁹⁾. Every case in this Court has gone more and more against these kind of settlements. For example, this Court will not "rectify" a voluntary settlement. Here, also, the form in which the equity of redemption in the subsequent mortgage was reserved shows that the testatrix did mean to keep the property under her control; and we say that in fact it was so throughout: *Anderson v. Elsworthy* ⁽¹⁰⁾. The case of *Mountford v. Keene* is identical with the present case, and is not overruled by *Phillips v. Mullings*. They are now the general law on this question, which is not whether a man shall or shall not give away his own property in his *lifetime, but whether he shall or shall [375 not put it quite out of his power for ever. If he means the latter, he must be shown to have all the requisite advice and knowledge of his acts, and proof of that lies on those who support the validity of his acts.

Thirdly: As to the question of election.

Assuming the Court to be against us on the other part of the case, it is plain that the two defendants must (according to the

(1) 1 P. Wms., 577.

(2) 2 Jac. & W., 565, 575-578.

(3) 22 Beav., 452-461.

(4) Law Rep., 7 Ch., 244, 247.

(5) Ibid. 9 Eq., 44.

(6) Ibid. 10 Eq., 405.

(7) 19 W. R., 708; 3 Davidson's Precedents, "Settlements," 823, n.

(8) 30 Beav., 243.

(9) 81 Ibid. 629; 3 D. J. & S., 487.

(10) 7 Jur. (N.S.), 1047.

well known rules of the Court) make their choice of the benefits conferred on them. The plaintiffs in the cross bill being infants, were not called upon to answer, and did not answer, the bill in the first suit. As it was essential for us, in order to get a decree to set aside the settlement, to show a case of either fraud, surprise, or mistake (we rely on the last), it was practically impossible for us to raise that case otherwise than by the cross bill.

On the whole case, therefore, we say this settler had not proper advice when she executed this settlement. She was not made to understand its irrevocable character; nor was the difference between a revocable and an irrevocable instrument properly explained to her. All her own conduct points to the conclusion that she meant it to be revocable. There was a clear mistake on her part and on that of her solicitor; and, under all the circumstances of the case, this Court will not allow the deed to stand; it will set it aside and uphold the will.

Mr. *Greene*, Q.C., and Mr. *Morshead*, for Lewis Hall, Ruth Hall the elder, and Sophia Green and her husband, the principal defendants in the second suit:

These cases must, after all, be determined on their own facts. There is no decided case exactly like the present. It is a fallacy to say that the settler wished this deed to be revocable. The evidence shows she had a morbid horror of making wills; and though she did make more than one, at the time when she executed this settlement she fully believed that she had finally provided for the children who were to benefit by it. The instructions given by her to Mr. Humble show that she had a life interest under the settlement; and unless there is some inconsistency or contradiction (which we say there is not) between the settlement as prepared and executed by her and the instructions given 376] for it, we must take *it that the deed does express her real wishes. We say, therefore, that there is nothing to show any desire on her part to retain a power of revoking the settlement. Indeed, the evidence relied on by the other side is far too conflicting and uncertain to be accepted by the Court. What the family thought is of no consequence. What she herself did is of much. But we say that, looking at the evidence which we have adduced in support of the settlement, it is impossible for the Court to say it is not now a valid and subsisting deed, and one which must be upheld.

Then as to the cases cited: *Naldred v. Gilham* ⁽¹⁾ was very different from this case. There there was distinct "fraud." So also in *Cecil v. Butcher* ⁽²⁾. In *Nanney v. Williams* ⁽³⁾ the intention of the settler was plain, and admitted of very little

(1) 1 P. Wms., 577.

(2) 2 Jac. & W., 565, 575-578.

(3) 23 Beav., 452-461.

question. *Wollaston v. Tribe* ⁽¹⁾ and *Everett v. Eve* considered in that very case of *Phillips v. Mullings* ⁽²⁾ there said that they had gone too far. Lord Hathe decision, has brought back the law to a very sensible

The distinction taken between the different kinds of settlements has no application here, where the only settler was to make an equal provision for her seven. At the utmost it could only be said that there was a to protect one child, or one set of children, again. But how does that assist these infant plaintiffs? No

Mountford v. Keene ⁽³⁾ is a strange authority for the to rely on, because it was the case of a purchaser for out notice. *Toker v. Toker* ⁽⁴⁾ was also a peculiar case existed in it, though it was afterwards explained as is to be observed that there the settlement was ultimate

As to the question of election, we do not dispute ask only for a decree according to the prayer of our first suit.

[They also cited *Sear v. Ashwell* ⁽⁵⁾; *Bolton v. Worrall v. Jacob* ⁽⁶⁾; *Fletcher v. Fletcher* ⁽⁷⁾; *Re V. Trusts* ⁽⁸⁾; *Childers v. Childers* ⁽⁹⁾; *Jefferys v. Jefferys*

Mr. Stallard, for *Ellis Hall*.

Mr. Bagshawe, for *Lupton*.

SIR JOHN WICKENS, V.C.:

Mr. Miller, I do not think I need trouble you. I very unwillingly to a conclusion — but I have come to sion — in your favor.

A voluntary settlement of real estate, though con power of revocation, is always to some extent in the power, since he can at any time sell or mortgage property.

And there can hardly be any legal presumption that son ordering and executing a deed, which, though does not purport to be revocable, believes that he has of revoking it at his pleasure.

Hence it is not, I think, quite easy to recognize as conclusion that the absence of a power of revocation voluntary settlement of real estate is, where a revocation would answer the settler's purpose as well as an one, *prima facie* evidence of mistake; and that that 1

⁽¹⁾ Law Rep., 9 Eq., 44.

⁽²⁾ Ibid., 10 Eq., 406.

⁽³⁾ Ibid., 7 Ch., 244, 247.

⁽⁴⁾ 19 W. R., 708; 8 Davidson's Precedents, "Settlements," 823, n.

⁽⁵⁾ 2 D. J. & S., 365.

⁽⁶⁾ 81 Beav., 629; 8 D. J.

⁽⁷⁾ 8 Sw., 411, n.

⁽⁸⁾ Ibid., 414.

⁽⁹⁾ 8 Mer., 256.

⁽¹⁰⁾ 4 Hare, 67.

⁽¹¹⁾ 3 K. & J., 310.

⁽¹²⁾ Cr. & P

evidence can only be rebutted by showing that the settler had his attention pointedly called to these facts — that his purpose could be effected by a revocable as well as by an irrevocable deed ; and that if the deed contained no power of revocation, it would be irrevocable. But such seems to be the result of the recent authorities.

It is necessary that fraud, surprise, or mistake should be proved before a voluntary settlement can be set aside. And to set it aside a cross bill is necessary : as is clearly laid down in the case of *Re Way's Trusts*. The doctrine which seems to have been introduced since Sir W. Grant decided *Worrall v. Jacob* is, that although a cross bill is necessary, there is in such [378] a case a sort of *presumption or mistake, which to a great degree, if not entirely, changes the onus, and throws a very peculiar burthen on the persons who support the settlement. The reasoning on which that conclusion is founded is not perfectly satisfactory to my mind ; but of course I am bound to follow the authorities. Most of them have been cited in the arguments, and need not be now particularly noticed. I should, however, observe that the judgment in *Mountford v. Keene* (*) is precisely in point, and is not, I think, inconsistent with anything that was stated in *Phillips v. Mullings* (*).

No doubt amongst the very numerous cases that were cited there are shades of difference, as there must be where very ill-defined rules are applied to various instruments and under various circumstances. But the fair deduction from the cases altogether, especially from the more recent ones, seems to me to be such as I have stated.

It was argued in this case that when Mrs. Hall executed the deed she knew that she was doing, by an irrevocable act, what she might as well have done by a revocable one. But — weighing as well as I can the evidence in this case, and giving no more than a fair weight, but giving a certain amount of weight, to the inference from her subsequent conduct and expressions as to her intentions at the time when she executed the deed — I cannot accede to that view. I doubt, in fact, if on the evidence, I could even come to a conclusion that she knew the deed to be irrevocable when she executed it.

Therefore, without adverting to the very numerous points which have been argued — some of them points of very great importance and of great difficulty — I think I must hold this settlement to be invalid.

The result is, that the original bill will be dismissed with costs against Mr. Thompson ; but without costs against everybody

(*) 19 W. R., 708 ; 8 Davidson's Precedents, "Settlements," 823, n.

(*) Law Rep., 7 Ch., 244, 247.

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else; and a decree will be made in the cross suit setting aside the settlement, but also without costs. Mr. Lupton may have his costs out of his own estate. No other decree will be made on the cross bill. It seeks to establish the will; but the evidence necessary *for that purpose has not been given, and [379 probably it will not be pressed.

Solicitor for the plaintiffs in first suit: Mr. *M. K. Braund*, agent for Mr. *James Green, Bradford, Yorkshire*.

Solicitors for the plaintiffs in cross suit and *Ellis Hall*: Messrs. *Duncan & Murton*, agents for Mr. *George Humble, Bradford, Yorkshire*.

Solicitors for *M. W. Thompson*: Messrs. *Paterson, Snow, & Burney*, agents for Messrs. *Busfield & Atkinson, Bradford, Yorkshire*.

See *Phillips v. Mullings*, 2 Eng. Rep., 259; *Turner v. Collins*, 2 Eng. Rep., 290.

M.R. June 4, 20, 1872.

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[Law Reports, 14 Equity Cases, 407.]

[1869 C. 256.]

Injunction — Copyright — Illustrated Catalogue — Advertisement — costs.

There is no copyright in a descriptive advertisement, illustrated or otherwise, of articles which any one may sell.

Where an upholsterer, who had published an illustrated furnishing guide with engravings of the articles of furniture which he sold, and descriptive remarks thereon, filed a bill to restrain the defendant, another upholsterer, from publishing, for the purposes of his own trade, a similar work in which many of the said engravings and portions of the letterpress of the first work were alleged to be copied:

Held, that the defendant could not be restrained by injunction from so copying the plaintiff's illustrations or such part of his work as was not original but merely descriptive of his stock, or of common articles of furniture; but that, the defendant's work being a flagrant imitation of the plaintiff's, he could be allowed no costs.

This was a suit by the plaintiff, James Cobbett, an upholsterer and house furnisher at Deptford Bridge, to restrain the defendant *Francis Woodward, who carried on a similar [408 business at Worcester, from printing and publishing a work called *F. Woodward & Co.'s Illustrated Furnishing Guide*.

The plaintiff carried on an extensive business, and executed orders for furniture and other articles for various parts of the kingdom. In 1866 he published a work on the subject of furnishing and furniture under the title of *Cobbett & Co.'s New Furnishing Guide*, or the *Illustrated Furnishing Guide*, containing an introduction and remarks on housekeeping written by the plaintiff himself, with numerous engravings and illustrations of designs and articles of furniture which were sold by his firm.

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These engravings, as the bill alleged, represented designs and patterns of articles, the drawings of which were specially made from goods manufactured and sold by the plaintiff. The professed intention of the said work was to promote and extend the plaintiff's business. The plaintiff's work was registered as a new publication.

The bill alleged that the defendant had recently caused to be printed and published, with the view of attracting customers to his own establishment, a book bearing the titles of *F. Woodward & Co.'s Illustrated Furnishing Guide*, or *New Furnishing Guide*, as a new and original work, but which was, in a great measure, copied and taken from the plaintiff's book, and to a considerable further extent was in its style and plan, as well as in particulars, a colourable imitation thereof, and passages were cited from the introduction and other parts of the defendant's book in part identical or very similar to certain passages in the plaintiff's book.

The bill also alleged that the defendant had not only adopted the plan of having illustrations in his book, but instead of having drawings made of the articles in his stock which he desired to sell, the defendant had in his book appropriated and copied illustrations from the plaintiff's work, and that, out of 123 illustrations contained in the defendant's book, at least fifty had been taken from the plaintiff's.

The bill also alleged that the plaintiff's book and the copyright thereof had been produced by and from the plaintiff's experience, labour, and money, and was his property, and an important adjunct to his business; that the defendant was using the plaintiff's property, which he had so appropriated, for the 409] purpose of *competing with and injuring the plaintiff in his said business, and without the plaintiff's authority or acquiescence, and prayed that the defendant might be restrained by injunction from issuing or distributing and also from printing and publishing his said book, or any book containing any passages or illustrations copied or colorably altered from the plaintiff's book.

The defendant by his answer admitted the publication of the book complained of, and stated that it had been for many years the practice of manufacturers of and dealers in articles of household furniture to print and circulate furnishing guides with priced catalogues or drawings and illustrations of the articles they manufactured or sold; that many such books were compiled before the alleged publication of the plaintiff's book, and that in 1864 a book of that description was compiled and printed by the defendant himself; that the articles of household furniture manufactured and sold by different manufacturers and

dealers were the same, and that the designs and patterns of such articles were (with rare exceptions) in common use throughout the trade, and that the illustrations in the books of different manufacturers and dealers were generally the same in outline and design, and were frequently identical; that, with regard to the printed matter in the plaintiff's book, there was no new or original matter which entitled the plaintiff to a proprietorship or copyright therein; and that with regard to the illustrations which the defendant was charged with having copied there were none which were not identical with or colorable imitations of designs or patterns previously printed by other manufacturers or dealers.

It appeared that the plaintiff had published a previous work in 1858, considerable portions of which were, as the defendant alleged, reproduced in his work published in 1866.

The defendant by his answer entered minutely into the sources from which the illustrations in his work had been obtained, and the reasons for their similarity to the plaintiff's.

Evidence was gone into on both sides which, in the view taken by the Court, it is not material to refer to.

Mr. *Southgate*, Q.C., and Mr. *Millar*, for the plaintiff:

The plaintiff in this suit has established a case which will entitle him to the protection of the Court. An illus- [410] trated furnishing catalogue is as much the property of its compiler as any other book, and he is entitled to have his copyright protected. The compiler of a dictionary, or of a concordance to the Bible or to any standard work, such as *Shakespeare*, of which many successive editions are published, would, we submit, have a copyright in such works, and there is no distinction between them and a work of the character of the plaintiff's. The plaintiff's contention is supported by *Kelly v. Morris* (1).

It is clear from a comparison of the defendant's book with the plaintiff's, that a portion of the letterpress and above fifty of the engravings are copied from the plaintiff's book, and the evidence fails to show that they were derived from a common source. The Court has in analogous cases interfered for the protection of authors or compilers, as in *Cassell v. Stiff* (2) and *Novello v. Sudlow* (3); and as the defendant has, without permission or acknowledgment, availed himself of the result of the plaintiff's labors, he must be restrained from further issuing the book complained of.

Mr. *Fry*, Q.C., and Mr. *W. Pearson*, for the defendant:

The plaintiff's book does not come within the provisions of the copyright acts, which were intended to protect works of a

(1) Law Rep., 1 Eq. 697.

(2) 3 K. & J. 279.

(3) 12 C. B., 177.

literary character or of lasting benefit to mankind, and also engravings of the fine arts, but not to protect a tradesman's catalogue or its illustrations. The plaintiff cannot have a right to sue in respect of any alleged copy or imitation taken from books which had previously appeared, and which were not protected by registration: *Murray v. Bogue* ⁽¹⁾; *Rundell v. Murray* ⁽²⁾. This cannot be called an original work, for many of the illustrations are taken from other works.

Many parts of the plaintiff's work are reproduced from a work which he published in 1858, and yet the work of 1866 was registered as a new publication. This, we submit, disentitles him to the protection of the Court, which has in other cases put a very 411] stringent *construction upon the Copyright Act, 5 & 6 Vict. c. 45. Thus, in *Low v. Routledge* ⁽³⁾, errors in the registry of proprietorship as to the date of the first publication of a work and the name of a publisher were held by Vice-Chancellor Kindersley to invalidate a subsequent assignment under the act. *Mathieson v. Harrod* ⁽⁴⁾ was a similar case. The right to sue and the right to assign depend upon the same principle.

In *Leather Cloth Company v. American Leather Cloth Company* ⁽⁵⁾ the question was considered how far an alleged colorable imitation of a trade mark could be permitted, and in that case it was held that, where a stamp was used by the defendants, and the form of the printed words, the words themselves, and the pictured symbols so much differed from those of the plaintiffs that any person with reasonable care and observation might see the difference and not be misled, there could be no case of infringement.

With regard to the printed matter, even if your Lordships should hold that a few lines have been copied from original matter in the plaintiff's book, an injunction could only be granted in respect of that particular part: *Jarrold v. Houlston* ⁽⁶⁾. As regards that part which is not original matter, the question is whether the defendant's alleged imitation has done any injury to the plaintiff. This the plaintiff has failed to prove: he could not, therefore, sustain an action, and ought not to obtain an injunction to restrain the publication of the defendant's work.

Mr. Southgate, in reply, referred to *Lewis v. Fullarton* ⁽⁷⁾.

June 20. LORD ROMILLY, M.R.:

This is a suit to restrain the defendant from printing and publishing any copy of a work called "*F. Woodward & Co's Illustrated Furnishing Guide.*"

⁽¹⁾ 1 Drew., 353.

⁽²⁾ Jac., 311.

⁽³⁾ 11 H. L. C., 528

⁽⁴⁾ 8 K. & J., 708.

⁽⁵⁾ 33 L. J. (Ch.), 717.

⁽⁶⁾ Law Rep., 7 Eq., 270.

⁽⁷⁾ 2 Beav., 6.

The plaintiff carries on business on a very large scale as an upholsterer and house furnisher at Deptford bridge. In the course of his business he has printed and published a guide for furnishing *houses, illustrated with a great number of [412 drawings, representing articles of furniture and decorations, interspersed with some judicious remarks. The defendant is a person engaged in a similar business on an extensive scale in the city of Worcester, and he has also published a similar book entitled *F. Wood & Co.'s Illustrated Furnishing Guide*. In it he has adopted the style of the plaintiff's work, and precisely copied, printed, and published as many as fifty-five of the plaintiff's drawings of decorated furniture. I am convinced, on examining the evidence, that these were expressly and exactly taken from the illustrations of the plaintiff. In addition to this the defendant has extracted certain passages from the synopsis and introduction of the plaintiff's work and his general remarks without acknowledgment. These require separate consideration. On the whole I am quite clear that the defendant has availed himself of and has copied precisely the plaintiff's work wherever he found it advisable so to do, and that he had done this without acknowledgment, but the letterpress copied does not amount to twenty lines, while the illustrations are at least fifty-five.

The question is whether, in this state of circumstances, I can restrain the defendant by injunction from publishing his work entitled *F. Woodward & Co.'s Illustrated Furnishing Guide*.

The first question is, does the defendant really sell the articles he describes in this work? and next, if he does, is he entitled to tell the public that he does so?

First, I am of opinion that he does really sell these articles. This, in fact, is not disputed. And next, I am of opinion that there is no monopoly in the construction and sale of these articles, and consequently that he is entitled to tell the world that he does so sell them. The only question is whether he is entitled to tell the world that he does so in the form and manner which is shown by the contents of this work.

The argument relied upon by the plaintiff for an injunction consists in drawing an analogy between this work and the compilation of such works as a post office directory, a concordance of the Bible, or of Shakespeare, or a dictionary where the same work is either repeated year after year with little variation and with little addition, and where occasionally it is exactly repeated in *edition after edition as in the ordinary case of a con- [413 cordance. Now, there is certainly no question that such works so compiled are protected, and though a fresh compiler might do the same thing if, to use a vulgar but significant expression,

"he did it off his own bat," that is, by his own individual exertion, as if no one had ever done it before; yet if it be shown that the fresh compiler has used the exertions of the previous compiler he will be restrained by injunction from so doing. But the distinction between those works and the present is this: those works are compiled and published for the information and use of the public, and are bought by the public without any reference to individual benefit — nothing in the shape of advertisement of articles specified in the work forming a part of the work. But this is a mere advertisement for the sale of particular articles which any one might imitate, and any one might advertise for sale.

To draw the distinction more clearly: If a man not being a vendor of any of the articles in question were to publish a work for the purpose of informing the public of what was the most convenient species of articles of house furniture, or the most graceful species of decorations for articles of house furniture, what they ought to cost, and where they might be bought, and were to illustrate his work with designs and with drawings of each article he described — such a work as this could not be pirated with impunity, and the attempt to do so would be stopped by the injunction of the Court of Chancery; yet, if it were done with no such object, but solely for the purpose of advertising particular articles for sale, and promoting the private trade of the publisher by the sale of articles which any other person might sell as well as the first advertiser, and if in fact it contained little more than an illustrated inventory of the contents of a warehouse, I know of no law which, while it would not prevent the second advertiser from selling the same articles, would prevent him from using the same advertisement, provided he did not in such advertisement by any device suggest that he was selling the works and designs of the first advertiser.

At the same time, I am bound to say that where it is shown that the second advertiser has been making use literally of the drawings of the first advertiser, and copying them precisely, I 414] think *that the Court, though it could not stop him from taking that course, must feel that a use has been made of the works of the first advertiser which would not be considered fair amongst gentlemen, nor (for the rules are the same as regards the usual intercourse of life) amongst fair traders, and would not give costs to the man who deliberately endeavored to profit by the exertions of his fellow tradesman. But at the last it always comes round to this, that in fact there is no copyright in an advertisement. If you copy the advertisement of another you do him no wrong unless in so doing you lead the public to believe that you sell the articles of the person whose advertisement you copy.

A different rule applies to the letterpress which is said to be copied. Wherever this letterpress bears the trace of original composition it is entitled to protection, but not where it simply describes the contents of a warehouse, the exertions of the proprietor, or the common mode of using familiar articles.

Now, examining the defendant's work by this rule, I find the defendant has copied some lines from the plaintiff's synopsis. I think these were original remarks, and that the defendant was not entitled to use them without acknowledgment of the source from whence they came. The other parts complained of cannot, I think, be treated as having any copyright.

I think the plaintiff is entitled to an injunction, if he thinks it worth taking, to restrain the republication of the eight lines from the synopsis; but I shall give no costs, on the ground that it is a flagrant copy of the plaintiff's work in the cases I have mentioned.

Solicitors for the plaintiff: Messrs. *Pritchard & Englefield*.

Solicitors for the defendant: Messrs. *Duignan, Button, & Smiles*, agents for Mr. *F. Corbett*, Worcester.

M. R. July 12, 1872.

*FUSSELL v. DOWDING.

[421

[Law Reports, 14 Equity Cases, 421.]

1872 F., 7.

Marriage Settlement—Trust for Wife if she survived her Husband—Effect of Decree for Dissolution of Marriage.

By a marriage settlement the wife's property was vested in trustees upon the usual trusts, and if there should be no issue of the marriage (which was the case) it was to be in trust for the wife, her executors, administrators, and assigns, in case she survived her husband. On the wife's petition the marriage was dissolved:

Held, that she was absolutely entitled to the property.

By a settlement, dated the 30th of April, 1858, made on the marriage of the plaintiff, Maria Mary Fussell, and Pierre Count de Gendre, certain real and personal estate to which the plaintiff was entitled was vested in trustees upon trusts, certain of which (so far as material) were as follows: Upon trust, during the joint lives of the Count de Gendre and the plaintiff, for the plaintiff for her *separate use, and if there should not be [422 any issue of the said marriage, then the trustees should stand possessed of the trust fund in trust for the plaintiff, her executors, administrators, and assigns, in case she survived the Count de Gendre, but if she should die in his lifetime, then in trust, after her decease and such failure of issue as aforesaid, to pay the income to the Count de Gendre for the residue of his life, and subject thereto for such persons as should be of her

own kindred, in such manner as the plaintiff should by will appoint, and in default of such appointment, for such persons as would be entitled thereto under the Statutes of Distribution, in case she had died intestate and unmarried.

There was no issue of the said marriage.

In July, 1870, the plaintiff presented a petition to Her Majesty's Court for Divorce and Matrimonial Causes, praying for a dissolution of the said marriage, upon which a decree nisi for the dissolution of the marriage was obtained, and by a final decree of the said Court made on the 7th of November, 1871, the said marriage was dissolved.

The plaintiff filed her bill against her late husband and the trustees of the settlement, praying that she might be declared absolutely entitled to the said property.

Sir *R. Baggallay*, Q.C., Mr. *Davey*, and Mr. *Solomon*, for the plaintiff:

We contend that, as there was no issue of the marriage, the trust in favor of the plaintiff in case she survived her husband took effect upon the marriage being dissolved, for she is now in the same position as if the husband had died.

In *Swift v. Wenman* ⁽¹⁾ a similar question came before the Court. There, under marriage articles, the personal property of the wife, who was then an infant, was agreed to be settled upon the usual trusts, with an ultimate trust for the wife absolutely if she survived. There were no children of the marriage. A decree for dissolution of the marriage was made at the suit of the wife, who filed a bill claiming the trust fund, and she was held by your Lordship to be entitled to it. *Wilkinson v. Gibson* ⁽²⁾ and *Wells v. Malbon* ⁽³⁾ were decisions to the same effect.

423] *It is clear that the right of the husband ceased upon the decree for dissolution of the marriage, and no claim can be set up on behalf of the plaintiff's next of kin.

Mr. *Roxburgh*, Q.C., and Mr. *W. J. Harvey*, for the Count *de Gendre*, disclaimed any interest under the settlement.

Mr. *Fry*, Q.C., and Mr. *F. J. Turner*, for the surviving trustee:

On behalf of the next of kin of the plaintiff, we submit that the settlement is still binding. By the construction contended for the Court would be treating as dead a man who is still living. Further, unless there is issue of the marriage a decree in the Divorce Court does not give the Court any power to deal with marriage settlements: *Graham v. Graham* ⁽⁴⁾; *Evans v. Carrington* ⁽⁵⁾.

⁽¹⁾ Law Rep., 10 Eq., 15.

⁽²⁾ Law Rep., 4 Eq., 162.

⁽³⁾ 31 Beav., 48.

⁽⁴⁾ Law Rep., 1 P. & D., 711.

⁽⁵⁾ 1 J. & H., 598.

LORD ROMILLY, M.R. :

I am of opinion that the plaintiff is entitled to the property.

Solicitors for the plaintiff: Messrs. *Ellis v. C.*

Solicitors for the defendants: Messrs. *Gusce Daw*; Messrs. *Robinson & Preston*.

M.R., July 10, 12, 1872.

MONSELL V. ARMSTRONG.

[Law Reports, 14 Equity Cases, 428.]

1872 M., 20.

Power of Sale — Administrator durante minore.

A power of sale given by a testator to his executors or administrators, exercised by an administrator *durante minore ætate*.

THIS was a suit by the vendor for the specific performance of a contract for sale.

John Edgley, by his will, dated the 8th of January 1868, bequeathed to his wife, Sarah Edgley, all his personal property subject to the payment of debts, except that as to mortgage debts charged on his real estate, he directed them to be paid out of his real estate in the county of Middlesex the primary fund for payment thereof; and devised his real estate, after the decease of his wife, Sarah Edgley, to the use of his daughter, Ann Edgley, her heirs and assigns, subject to the payment of the mortgage debts charged on the real estate, and to the exoneration of his other property, with the following proviso: "Provided always, that in case the person or persons for the time being be entitled to the said mortgage debts, or any part thereof, shall require the same to be paid off, it shall be the duty of my executors or administrators, or executor or administrators for the time being, to provide for the payment thereof, out of all or any part of the hereditaments comprised in the devise hereinbefore contained, and to bargain, sell, or otherwise dispose of the real estate so intended to be sold to the purchasers thereof, his, her, or their heirs, executors, administrators, or assigns, or as he or they shall direct; and the receipts of my said executors or executor, or administrators or administrators, shall be good and sufficient discharge for the moneys therein expressed to be received; and that the said executors or administrators shall be bound to see to the application thereof, whether any such mortgage money as aforesaid had been paid, or whether any such sale ought to be made, notwithstanding any actual notice to the contrary of any of the premises." And it was thereby also provided that, in

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Monsell v. Armstrong.

M.R.

should be any surplus money arising from such sale, the same should be invested in the name or names of the testator's "said executors or administrators, or executor or administrator." as therein mentioned. And the testator appointed the said Sarah Edgley and Ann Edgley executrices of his said will.

The testator died in 1855, and his will was proved by the said Sarah Edgley and Ann Edgley.

Sarah Edgley died on the 28th of February, 1870, having by her will left all her property to the said Ann Edgley (then the wife of Charles Monsell), who died intestate on the 4th of March, 1870, leaving her said husband, Charles Monsell (who afterwards died, having by his will left all his property to his wife, who had predeceased him), and two infant children, Charles Monsell the younger and Annie Monsell, her surviving. The said infants became, on their father's death, entitled to the unadministered personal estate of the testator, John Edgley.

On the 18th of May, 1872, letters of administration with the will annexed of the personal estate of the testator left unadministered by the said Sarah Edgley and Ann Edgley (afterwards Monsell) were granted to the plaintiff, Catherine Georgina Monsell, for the use and benefit of the said infants, Charles Monsell and Annie Monsell and until one of them should attain the age of twenty-one years.

In July, 1871, the plaintiff, as the administratrix of the testator, put up for sale a farm and cottage in Berkshire, being part of the said residuary real estate, under certain conditions of sale, by one of which it was stated that the vendor was a legal personal representative, selling under a power of sale, and that the concurrence of the persons beneficially interested should not be required. The object of the sale was to pay off the mortgage on the property, the payment thereof being required by the mortgagee.

The defendant was declared the purchaser of the property at the sale, and signed an agreement to complete the purchase according to the conditions.

The defendant objected to complete the purchase, mainly on the ground that the plaintiff, being administratrix *durante minore ætate* only of the testator, was unable to exercise the power of sale contained in his will.

Mr. Joshua Williams, Q.C., and Mr. W. Brodrick, for the plaintiff:

The power of sale contained in the testator's will, being given to his "executors or administrators," can be properly exercised by the plaintiff, as administratrix *durante minore ætate*, for the benefit of the infants. It is clearly settled that, though an administrator *durante minore ætate* has only a special and limited

property in the estate of a deceased, he can do, and which are incumbent on an executor, and which are a charge on the estate of the infant and the estate of the deceased. Digest, Administration ⁽¹⁾; Williams on Executors, we submit, for the benefit of the infant child, to sell that this property should be sold, and that the administratrix within the meaning of the *power, the duty of the plaintiff to pay the testator's debts, mortgage debts are charged on the real estate cannot be paid off except by the exercise of the power. The plaintiff's contention is supported by the case of *Martin* ⁽²⁾, where real estate was devised to A. as sole executor, in trust to sell and pay the testator's debts, and to give discharges, and to execute the power and disclaim. Your Lordship there held that the person who had taken out administration, could sell the real estate on valid receipts.

The objection raised by the defendant cannot stand, and the plaintiff is entitled to a decree for specific performance.

Sir R. Baggallay, Q.C., and Mr. Charles Hall, for the defendant.

The power of an administrator *durante minore ætate* enable him to sell real estate. It is laid down in *bona peritura* as a bailiff may do, and he can sell for the benefit of the infant, or for the payment of debts; he can go no further. *Bacon's Abr. Executors and Administrators* ⁽³⁾. Here we submit that the power was given by the death of Sarah Edgley, when the property became the owner in fee simple. Besides, it cannot be shown that the exercise of the power, if it now exists at all, is for the benefit of the infant; and at any rate it is too doubtful a title for a purchaser.

Mr. Joshua Williams, in reply.

July 16. LORD ROMILLY, M. R.:

I have looked at this case very carefully, and cannot find any distinction between a common administrator and an administrator *durante minore ætate* as regards the exercise of a power. I am of opinion that a good title can be made to the infant, and that there must be a decree for specific performance, with costs.

Solicitors for the plaintiff: Messrs. Parker, Little, & Co.
Solicitor for the defendant: Mr. G. E. Philbrick.

⁽¹⁾ F., 231.

⁽²⁾ 6th. Ed., p. 469.

⁽³⁾ 29 Beav.

⁽⁴⁾ B., 2.

M.R. July 15, 16, 22, 1872.

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*AMBLER v. BOLTON.

[Law Reports, 14 Equity Cases, 427.]

1870 A. 71.

Partnership — Dissolution — Unsaleable Asset — Valuation.

Where part of the assets of a partnership consisted of a government contract entered into in the name of one of the partners and containing a proviso against alienation:

Held, that upon a dissolution of the partnership, the partner in whose name the contract was taken, and who continued to carry it on, must be debited in the accounts with its value, to be ascertained by a reference to Chambers.

THIS was a suit instituted by the legal personal representatives of Benjamin Ambler, deceased, for the purpose of taking the accounts of a partnership which had subsisted between him and the defendant, Thomas John Bolton, as carriers of Her Majesty's mails in London. Several questions were discussed at the hearing, but the present report is confined to the mode in which the Court dealt with a government contract entered into by the defendant in his own name, but, as the Court held, on behalf of the partnership.

The contract in question bore date the 28th of February, 1868. and was made between the Duke of Montrose, the then post-master-general, of the one part, and the defendant of the other part; and it was thereby agreed that the defendant, his executors, administrators, or assigns would, on and after the 1st day of April then next ensuing, and thenceforth until the said contract should be determined in the manner therein provided, convey or carry or cause to be conveyed or carried (subject as therein mentioned) Her Majesty's mails in or near London, as therein set forth, at the rates of payment thereby fixed. And it was thereby agreed that the contract should remain and continue in force on or from the 1st day of April then next ensuing until and including the 31st day of March, 1871, and should then determine, provided either of the said parties thereto, his executors or administrators or successors or assigns, should have given to the other of them, his executors or administrators or successors or assigns, twelve calendar months' previous notice 428] in writing of his or their desire to that effect. And in case no such notice should have been given, then the contract should continue in force until one of the said contracting parties, his executors or administrators or successors or assigns, should give to the other of them, his executors or administrators, or successors or assigns, twelve calendar months' previous notice in writing, dated from the 1st day of April in some one year and terminating on the 31st day of March in the then next year, of his or their desire that the contract should determine. And it was thereby

provided that it should not be lawful for the decutors or administrators, at any time or times continuance of the contract to give, grant, bargain, underlet, or otherwise part with or dispose of the undertaking, or the benefit or advantage thereof, or of the several covenants, matters, and things contained, or any of them, to any person or persons anything therein contained to the contrary notwithstanding. And that in case the defendant, his administrators, should make breach of or default in the covenants or agreements therein contained and on behalf of him or them to be observed and performed in any such case it should be lawful for the Plaintiff for the time being, by writing, absolutely to revoke and make void the contract.

The terms of the partnership were not expressed. It appeared that originally the partners were interested in equal shares; but that an arrangement was afterwards made by which Benjamin Ambler became, as from the 1st of January 1870, entitled to three-eighths of the partnership assets and the defendant to the remaining five-eighths. Benjamin Ambler died in March, 1870. After his death, and down to the time of the trial, the defendant continued to carry the mails under the contract and had derived considerable profits therefrom.

The bill prayed that, as to any portion of the profits and property which might not be in its nature a partnership asset, the defendant might, as regards the share of Benjamin Ambler therein, be declared a trustee thereof for the benefit of the plaintiff.

The defendant alleged that his partnership with Benjamin Ambler was confined to the working of the contract itself, and that the contract itself was not a partnership asset; but the plaintiff contended that it was. The court gave judgment in favour of the plaintiff on a **contrary opinion*. The defendant further claimed that the contract was for the exclusive benefit of the contract and all profits arising therefrom should be paid to the death of Benjamin Ambler, and that the contract could not be assigned to any person after his death. The court held that the contract could not be sold.

Mr. Southgate, Q.C., and Mr. Ince, for the plaintiff.

The defendant cannot claim the exclusive benefit of the contract without paying for it in some shape or other. The plaintiff is entitled to participate in the profits so long as the contract lasts, or a value must be set on it and paid by the plaintiff. This was done in *Smith v. Mules* (1). That the Court was prevented from doing justice by reason of a contract not assignable is shown by the case of *James v. Ellis*, where the Chancellor Stuart on the 20th of December, 1870,

(1) 9 Hare, 556.

mortgagor of a pension from the East India Company was ordered by the decree foreclosing the mortgage to execute an irrevocable power of attorney enabling the mortgagee to receive the same.

Mr. *Fry*, Q.C., and Mr. *Daniel Jones*, for the defendant :

The relief sought by the bill cannot be given. Why should the defendant be deprived of the right of putting an end to the contract when he pleases ? Then it is now sought to charge the defendant with the value, and the case of *Smith v. Mules* is cited in support of that view. There the partnership was between three solicitors, and the articles of partnership contained an express covenant by one of the partners that he would use his best endeavors to obtain the appointment of the firm to certain offices, and that the emoluments thereof should be treated as part of the partnership profits in direct violation of that covenant, the covenanting partner procured certain offices which fell within the covenant to be given to himself alone ; and upon that the Court held that the other partner was entitled to a decree for dissolution, and to charge the defendant with the value of the offices in the accounts. That was a totally different case from the present ; and *James v. Ellis* has still less to do with the matter.

Mr. Southgate, in reply.

430] *July 22. LORD ROMILLY, M.R., having stated the facts, continued :

I am of opinion that, under these circumstances, the contract formed part of the partnership assets, and there must be a declaration accordingly. The question then arises, how it is to be dealt with. There is a proviso which prevents the defendant from assigning it, and therefore it cannot be sold ; and as that cannot be done, a value must be put on it in the best way you can. I shall therefore refer it to Chambers to ascertain the value of the contract.

MINUTES OF DECREE :— Declare that the contract dated the 28th of February, 1868, formed a portion of the assets of the partnership heretofore subsisting between the defendant and Benjamin Ambler, deceased. Declare that the said Benjamin Ambler and the defendant respectively were, and that the plaintiffs, as legal personal representatives of the said Benjamin Ambler, and the defendant now are, entitled to the profits made by and arising from the said contract, and all and singular the assets of the partnership business as from the commencement of the said partnership up to and including the 31st day of March, 1868, in equal shares, and as from the 1st day of April, 1868, in the proportions following : that is to say, the said Benjamin Ambler and the plaintiffs, as his legal personal representatives, were and are entitled to three equal eighth parts thereof, and the defendant is entitled to five equal eighth parts thereof. The decree then directed, amongst others, the following accounts : An account of all the partnership assets, estate, and effects. And in taking such account, the value of the said contract of the 28th day of February, 1868, with the postmaster-general at the date hereof is to be ascertained. And in taking such accounts the defendant is to be charged with three-eighths of such value.

Solicitors : Mr. T. Donnithorne ; Messrs. Allen & Edwards.

July 23, 1872, M. R.

*MACK V. PETTER.

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[Law Reports, 14 Equity Cases, 481.]

1872 M. 52.

Copyright — Infringement — Injunction.

The plaintiff, the publisher of a work which he claimed to have originated, called *The Birthday Scripture Text Book*, consisting of a printed diary interleaved, with a blank space opposite each day with a text of Scripture appended, and which was designed as a record of the birthdays of friends :

Held, entitled to an injunction to restrain the defendants from publishing and selling a work subsequent to the plaintiff's, called *The Children's Birthday Text Book*, on the ground that it was an infringement of the plaintiff's copyright in the title of his work, as well as a colorable imitation of the same.

THIS was a suit by a publisher and bookseller to restrain the publication and sale by the defendants, a firm of publishers, of a work alleged to be an infringement of the plaintiff's copyright.

The plaintiff was the proprietor and publisher of a book called *The Birthday Scripture Text Book*, of which there had been several editions, and he claimed to have the exclusive property and copyright in the said publication long prior to the printing or publication by the defendants' firm of another book called *The Children's Birthday Text Book*.

The plaintiff alleged that the *Birthday Scripture Text Book* was a very popular work, and had attained great notoriety under that title ; that the whole idea and arrangement of the work was originated by himself, and was entirely novel at the time when the work was first published, and that he had derived large profits from such publication.

The said *Birthday Scripture Text Book* consisted of a printed diary, interleaved with writing paper, so arranged as to give a blank space for writing upon opposite to each day in the diary, and underneath each date was a text of scripture, with a verse of a hymn. The book was designed as a record of the birthdays of friends, and in order that they might inscribe their names on the blank leaves opposite to the pages bearing the date of their respective birthdays.

The bill alleged that the defendants had, since the publication of the plaintiff's said book, published and sold a work [432 under the title of *The Children's Birthday Text Book*, arranged upon precisely the same plan as that of the plaintiffs' publication, and in fact imitated therefrom in most particulars, but differing in the selection of texts and verses, and with a colorable difference in the title, and that the preface was in part, if not altogether, pirated from the plaintiffs' work ; also that it was published in a form closely resembling the plaintiffs' work in

appearance, and so as to induce incautious purchasers to believe that the two works were the same.

The bill prayed that the defendants might be restrained by injunction from printing, publishing, selling, or exposing for sale the said *Children's Birthday Text Book*, or any other book or publication bearing the same title as the plaintiff's said publication, or such title with only a colorable variation, or containing the preface prefixed to the plaintiff's said publication, or any parts thereof, or any book or publication so printed, bound, arranged, or contrived, as by colorable imitation or otherwise to represent or lead to the belief that such book or publication was the same as the said *Birthday Scripture Text Book*.

The defendants submitted that there could be no copyright in such a title as that given to the plaintiff's work, or in the general design of the publication; that they were fully entitled to publish the *Children's Birthday Text Book*, and that the plaintiff was not entitled to come to the Court for an injunction to restrain them from its publication or sale.

Mr. Fry, Q.C., and Mr. Ingle Joyce for the plaintiff, referred to *Hogg v. Kirby* ⁽¹⁾; *Spottiswoode v. Clarke* ⁽²⁾; *Jarrold v. Houlston* ⁽³⁾; *Chappel v. Davidson* ⁽⁴⁾, *Braham v. Bustard* ⁽⁵⁾.

Sir R. Baggalay, Q.C., and Mr. Westlake, for the defendants:

There can be no copyright in the name of *The Birthday Scripture Text Book*, any more than in such a name as *Daily Text Book*, or *Christmas Text Book*, or *New Year's Text Book*. The only ground for the interference of the Court would be if it could be shown that by the publication of the defendants' work the pub-
433] lic *had been misled, and induced to believe that it was identical with the plaintiff's. This, we submit, the plaintiff has failed to establish, and is therefore not entitled to any relief.

LORD ROMILLY, M.R.:

I am of opinion that the plaintiff is entitled to an injunction. The defendants would be at liberty to publish a *Daily Text Book*, and so far to adopt the scheme of the plaintiff's work; but it was the plaintiff's own idea to have a text book associated with a birthday, and so to adapt it to those sentiments of religion with which most persons regard a day which marks the completion of another year of their lives. The plaintiff is entitled to a copyright in the use of the title, *Birthday Text Book*, whatever other words may be associated with it, and the defendants must be restrained from the publication of their work, and they are not entitled to publish a work with such a title, or in such a form as to binding or general appearance, as to be a colorable

⁽¹⁾ 8 Ves., 215.

⁽²⁾ 2 Ibid., 123.

⁽³⁾ 2 Ph., 154.

⁽⁴⁾ 3 K. & J., 708.

⁽⁵⁾ 1 H. & M., 447.

imitation of that of the plaintiff. The plaintiff is entitled to the costs of the suit.

Solicitors for the plaintiff: Messrs. *R. & W. B. Smith*, agents for Messrs. *Fry & Otter Bristol*.

Solicitors for the defendants: Messrs. *Ashurst, Morris, & Co.*

M.R., July 20, 1872.

***HARVEY v. WILDE.**

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[Law Reports, 14 Equity Cases, 438.]

1870 H., 118.

Practice—Administration—Creditors' Suit—Proof of Debt—Judgment against Executors—Proof of Debt against Devisees of Real Estate.

In a creditors' suit for administration of the real and personal estate of a testator, a judgment recovered against the executors (who were also trustees of the real estate) held to be *prima facie* evidence of a debt as against the persons interested in the real estate; but they were to be at liberty to adduce rebutting evidence.

THIS was a creditors' suit for the administration of the real and personal estate of William Wilde, deceased, who by his will, dated the 15th of February, 1865, appointed the defendants, Samuel Secker Hill and William Wilde, executors thereof; and also devised certain specific real estate to them upon trusts for the benefit of his daughter Eliza Reilly for life, and after her death for her brothers and sisters and the two sons of her deceased brother; and he empowered the said trustees to sell all his other real estate and to give receipts for the purchase money, and directed that the proceeds should fall into his personal estate, and after payment of his debts, funeral and testamentary expenses, be divided amongst his children and grandchildren, as therein mentioned.

The testator died on the 28th of July, 1866. He had, for several years previously to his death, had dealings with the firm of Harveys and Hudsons, who carried on business as bankers in Norwich; and that firm claimed a large balance as being due to them from the testator at the time of his death, and in February, 1869, commenced an action at law against the executors for the recovery thereof. The executors denied their [439 liability, and alleged that a balance was due to them from the bank, and commenced a cross action against the partners in the firm for the recovery of such last mentioned balance. Under an order of Court both actions were referred to arbitration. The parties and witnesses were heard before the arbitrator on the 27th and 30th of May, 1869, and the 17th, 18th, and 19th of February, 1870, the principal witness for the bank being Sir Robert Harvey, the senior partner therein. On the 18th of March, 1870, the arbitrator made his award, which however was

referred back to him on a rule obtained by the executors. On the 18th and 30th of May, 1870, the parties and witnesses again were heard before the arbitrator, who made a further award, whereby, as to the action by the executors, he found that nothing was due to them from the bank, and he directed judgment should be signed in that action for the costs of the defendants' suit; and as to the action by the bank, he found that the bank was entitled to recover from the defendants thereto; as the executors of the testators the sum of £5066 10s. 6d., and directed that judgment should be signed in that action for the said sum and for the costs of the plaintiffs therein. On the 13th of June, 1870, the executors again moved to refer the award back to the arbitrator, but the application was refused, and judgment was signed as directed by the arbitrator on the 14th of June, 1870.

On the 9th of July, 1870, the decree was made in this suit in the usual form, directing inquiries as to the real estate, and a sale both of the residuary and of the specifically devised real estate in the event of the personal estate proving insufficient for the payment of the testator's debts and funeral expenses.

On the 19th of July, 1870, Sir Robert Harvey died. On the 22d of July following the firm of Harveys & Hudsons was adjudicated bankrupt.

The personal estate of the testator proved insufficient for payment of his debts, and an application was made for a sale of the real estate. Thereupon the persons beneficially interested therein required that the debt due to Messrs. Harveys & Hudsons should be proved as against them, and the question whether they were entitled to require such proof was now brought before the Court on an adjourned summons.

440 *Mr. *Fry*, Q.C., and Mr. *Cozens Hardy*, for the trustee in bankruptcy, pointed out that in this case the executors were also devisees in trust, and urged the hardship of requiring the debt to be established a second time, the question having been decided after full hearing, and the principal witness being now dead.

Mr. *Chitty*, and Mr. *Maidlow*, for the persons interested in the real estate, contended that the judgment was against the executors only, and could not be enforced at law against the real estate of the testator; that the devisees were clearly entitled to have the debt established as against them: *Willson v. Leonard* (1); that the circumstance of the executors being devisees in trust made no difference: *Morse v. Tucker* (2); and that as to the hardship alleged to be occasioned by the death of Sir R. Harvey, the executors were at a like disadvantage before the arbitrator.

[They also referred to *Morley v. Morleg* (3).]

(1) 8 Beav., 373.

(2) 5 Hare. 79.

(3) 5 D. M. & G., 610.

M.R.

Gooch's Case.

LORD ROMILLY, M.R. :

I do not think that I can hold the devisees bound; but on a claim made in the suit such as have jurisdiction to decide on which side the burden lies. When a creditor brings in a claim I frequently action to be brought in order to decide the matter: the action has been tried and decided against the devisees; were necessary to have it tried over against the debt on the real estate, the delay would be endless. I think, therefore, that the judgment ought to be *prima facie* evidence of the truth; the devisees will be at liberty to disprove it, if they can; if they do not, I shall hold the debt binding against the devisees.

Solicitors: Messrs. *Sharpe, Parkers, & Pritchard*; *Roscoe, & Co.*

M. R. July 30, 1872.

**In re* CONTRACT CORPORATION.

GOOCH'S CASE.

[Law Reports, 14 Equity Cases, 454.]

Winding-up—Contributory—Transfer to Infant—Liability of Companies Act, 1862, s., 88.

G., a shareholder in a limited company, transferred his shares more than a year before the company was wound up. A. transferred to B. an infant, who transferred to B. three months before the winding-up; the transfers were all registered. B., who was *sui juris* at the date of the transfers, afterwards became bankrupt:

Held, that G. continued liable as a member till B.'s transfer was registered; and that he must be placed on the list of contributories as a partner.

THIS was an application by the official liquidator of the Contract Corporation, Limited, to place the name of T. on list B of the contributories.

In January, 1865, forty shares in the Contract Corporation were standing in the name of Gooch.

On the 14th of January, 1865, Gooch transferred the said shares into the name of Adams, who was then an infant. On the 21st of January, 1865, the transfer was registered.

On the 16th of August, 1865, Adams transferred the said shares to Dove, who was also an infant, and on the 1st of August, 1865, the transfer was registered.

On the 5th of December, 1865, Dove transferred the said shares then in his name to Beal, which transfer was registered on the 11th of December, 1865.

On the 20th of March, 1866, a petition was presented for the winding-up of the company, on which the winding-up order was made on the 23d of April, 1866.

*In 1868 Gooch was placed on list A of the contributories.

tories in respect of the twenty shares remaining in the name of Adams.

Beal, the transferee of the other twenty shares, who was *sui juris* at the date of the transfer, afterwards became bankrupt, and the object of the present application was to place Gooch on list B of the contributories in respect of the last mentioned twenty shares.

Sir *R. Baggallay*, Q.C., and Mr. *Chitty*, for the official liquidator :

We contend that Gooch's full liability as a shareholder continued till December, 1865, when the twenty shares in question were transferred to Beal, as the transfer to Adams and the mesne transfer to Dove were both void. This being so, and Beal having become bankrupt, Gooch is liable as a part shareholder, under sect. 38 of the Companies Act, 1862, to be put on list B of the contributories.

Mr. *J. Brown*, Q.C., and Mr. *Bagshawe*, for Mr. *Gooch* :

The official liquidator is precluded from disputing the title under which Beal took the shares, for he was accepted as a shareholder by the company. It is not, therefore, now open to him to repudiate the previous transfers, as he cannot both approbate and reprobate at the same time.

[They referred to *Curtis' Case* ⁽¹⁾ and *Lumsden's Case* ⁽²⁾.]

LORD ROMILLY, M.R. :

I am quite clear that Mr. Gooch must be put on list B of the contributories in respect of the twenty shares in question, His liability as a member did not cease till the transfer to Beal was registered ; the previous transfers amounted to nothing.

Solicitors for the official liquidator : Messrs. *Linklater & Co.*
Solicitor for Mr. *Gooch* : Mr. *H. W. Vallance*.

⁽¹⁾ Law Rep., 6 Eq., 455.

⁽²⁾ Law Rep., 4 Ch., 81.

V.-C.M. July 2, 3, 1872.

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*MANNOK v. GREENER.

[Law Reports, 14 Equity Cases, 456.]

1869 M. 270.

Legacy to Wife—Debt charged on Specific Devises—Free Occupancy of House—Right to let—Income of Real Property passes the Fee—Estate Tail.

A testator, by will dated in 1857, bequeathed to his wife all sums of money that had come to his hands as part of her patrimony for her sole use and benefit, with the option of leaving it invested at 5 per cent. to be paid her quarterly, or if she wished to draw it out, then the property most suitable for sale to be disposed of to raise the amount due to her, being in fact a charge upon the property ; and if she so desired, this, as well as all just debts and obligations due from him, to be discharged as the first act of his executors :

Held, that the wife's patrimony was to be treated as a debt, and a charge on the specifically devised property as well as the rest of the property.

Bequest to wife of furniture and effects, and the free occupancy of a house for life, after which the effects to revert back to the estate :

Held, that the free occupancy of the house entitled the wife either to reside in it or to let it during her life.

Devise to sons and daughters of an equal share in all the income of real property :

Held, that the devise of the income of the estate passed the fee.

Direction that any property might be sold except Glencoe, which was to remain in the family as long as there was a lineal son descendant of before named sons, and if no lineal male descendant from the eldest, the next to be entitled, and so on :

Held, that this clause created an estate tail in possession in the eldest named son.

WILLIAM GREENER, by his will dated the 5th of April, 1857, appointed executors and trustees, and then gave his property in these terms : " To my wife, Harriet Greener, I bequeath all sums of money that have come to my hands as part of her patrimony, and all that in her own right by bequest or otherwise may hereafter come, for her sole use and benefit, with the option of leaving it invested in the property at 5 per cent. per annum, to be paid her quarterly, or if she wishes to draw it out, then the property most suitable for sale to be disposed of to raise the amount due to her, being in fact a charge upon the property ; and if she so wishes, this, as well as all just debts and obligations due from me, to be duly discharged as the first act of my executors. In addition to this I leave her all my furniture, plate, linen, pictures, &c., in my *house at Stratford-on- [457 Avon at my decease, and the free occupancy of any house in my possession, for her life, free of any payments or charge whatever, after which the effects to revert back to the estate. To my sons, Joseph Henry, Albert John, and Arthur Ernest Greener, as well as my daughters, Sarah Ann Mannox, Mary Elizabeth Hawks, and Ann Maria Barnet, I leave and devise an equal share or shares in all the income of the real property left after carrying out the above. As I have given instructions as to the sale and paying of incumbrances on the estate, I trust the Almighty will give me life to accomplish it. In that case a more fully detailed will will be necessary. Any property I possess may be sold if required, except Glencoe, in Arden Street, Stratford-on-Avon, a property I wish to remain in the family as long as there is a lineal son descendent of the fore named sons, and if no lineal male descendant from the eldest, the next to be entitled, and so on."

The bill was filed for the administration of the testator's estate, and for the direction of the Court as to various questions arising under the will.

Mr. Bristowe, Q.C., and Mr. W. P. Beale, for the plaintiffs,

Sarah Ann Mannox and Elizabeth Hawkes, two of the testator's daughters, beneficiaries under and executrices of his will :

We say that an indefinite gift of income of real property passes the fee simple. The six children, therefore, of the testator named in that behalf are entitled to the fee in all the real property except the property called Glencoe, in which they only have a life interest, the subsequent part of the will conferring an estate tail male in remainder on the eldest son, with remainder over in tail male to the other sons ; the tenants for life being protectors of the settlement in respect of the estates tail.

The testator's debts are charged on all the testator's real estate, including Glencoe.

Mr. Glasse, Q.C., and Mr. Fellows, for other children of the testator in the same interest as the plaintiff.

Mr. F. A. Lewin, for another child of the testator claiming only as next of kin in anything undisposed of.

458] *Mr. Karlake, Q.C., and Mr. Woodhouse, for Joseph Henry Greener, the testator's eldest son and heir-at-law :

An indefinite gift of income of realty differs from a like gift of "rents and profits" of realty, which has a technical meaning, and is equivalent to a gift of the land itself: Hawkins on Wills (1).

The gift, being of "income," only confers life estates merely on the six children, and the remainder is undisposed of and falls to the heir-at-law.

The property called Glencoe is not included in the prior gift of income of all the real estate ; but there is an implied gift in tail male in possession of Glencoe to the eldest son : *Daintry v. Daintry* (2).

Where, as in the case of Glencoe, there is a specific devise, a charge, though expressed to be on all the property, does not affect the property specifically devised: *Spong v. Spong* (3); *Conron v. Conron* (4).

Mr. Glasse, Q.C., cited *Maskell v. Farrington* (5). The specific devise not referring to the previous charge of debts, and being in a subsequent part of the will, the testator's intention must be gathered from the latter part of the will, where there is a clear specific devise free from all charges.

Mr. Rowcliffe, for testator's widow :

The "free occupancy" of the house given to the widow confers a right to let it. The patrimony given to the widow must

(1) Page 120.

(2) 6 T. R., 307.

(3) 3 Bl., (N.S.), 84.

(4) 7 H. L. C., 168.

(5) 3 D. J. & S., 338; 1 N. R., 37;

10 W. R., 728.

be treated as a debt, and is charged on all the testator's property including Glencoe.

Mr. *Bristowe*, in reply.

SIR R. MALINS, V.C. :

The first question to be determined is as to the effect of the clause in the will containing the bequest to the testator's wife, Harriett Greener. It appears that the amount of the wife's patrimony has been found by the chief clerk to be about £1200. Does *the testator by this will treat the amount of her [459] patrimony as a debt? I am of opinion that he does, because he puts it in the same clause with his debts, and charges the property, which certainly must mean *prima facie* all his property; "the" property meaning the property which I have — that is, all my property; and he puts it on an equality with the debts, and states that it is in effect a charge on the property; "and if she so wishes" — and she does so wish — "this as well as all just debts and obligations due from me to be duly discharged as the first act of my executors." Now I take that to be a direction that, for the payment of all his just debts as well as this patrimony, it is the first duty of the executors, out of the property — that is, all and every part of his property — to raise that amount. It is, therefore, in my opinion, a charge upon every part of the property. But it has been argued, on the authority of the cases of *Spong v. Spong* ⁽¹⁾ and *Conron v. Conron* ⁽²⁾, that where you specifically devise property, and do not charge that specifically devised property, it is not charged with debts or legacies. Certainly in particular cases those are conclusive authorities, but I do not think they apply to this case. I see that in the case of *Conron v. Conron* the charge was by a codicil, and in *Spong v. Spong* it was in a subsequent part of the will. In *Conron v. Conron*, after a specific devise made, there was a general charge by a codicil. In *Spong v. Spong* it was this: "J. S., by a will properly executed, gave a sum of £4000, to be laid out in Government or real securities, in trust for L., the wife of S., for her separate use for her life; remainder to J. for his life; remainder to the children of L. by S." He then devised certain lands and tenements specified to various persons named in the will, and, after bequeathing several pecuniary legacies, he concluded thus: "And I do hereby expressly charge and make liable my real and personal estate to and with the payments of the aforesaid several legacies." It was there held, reversing the decree of the Court below, that the lands specifically devised were not liable to the payment of the legacies on a deficiency of the personal estate.

(1) 8 BIL. (N.S.), 84.

(2) 7 H. L. C., 168.

Now I think all these cases must depend upon the particular form of the will; and it seems to me to make a most marked difference whether a man begins by making a charge upon all 460] his *property, or whether he begins by making a specific devise or bequest and then charges his property, because, when he has made a specific devise or bequest, and then proceeds to charge his property, it may well be that he means "all that property which I have not already by this my will disposed of:" and accordingly I think this case falls within the decision of Lord Cranworth in *Maskell v. Farrington* ⁽¹⁾, where these two cases of *Spong v. Spong* ⁽²⁾ and *Conron v. Conron* ⁽³⁾ were pressed upon him. The question arose as to a will which was in these terms: "Rebekah Emmerton, by her will, charged and made chargeable the whole of her real and personal estate and effects with the payment of her just debts"—that being at the commencement of the will before any specific bequest—"and funeral and testamentary expenses, and also with the payment of the legacies thereafter given." She then devised specifically a copyhold messuage, which was the only real estate of which she was seised, and after giving certain pecuniary and specific legacies, she gave and bequeathed to her nephew, T. E. Cavit, all and singular other the residue and remainder of her real and personal estate and effects not thereinbefore specifically given or otherwise disposed of. The residuary estate proving insufficient for the payment of the pecuniary legacies, Vice-Chancellor Kindersley held that they were charged on the specifically devised copyhold. An appeal against that decision was presented on behalf of the specific devisees, and that having been argued, Lord Chancellor Cranworth says: "It has been ably argued that the Court is in this case bound by the decision of the House of Lords in *Spong v. Spong* and *Conron v. Conron*. Those decisions are governing authorities wherever the circumstances are in all respects the same; but not so when, as in the present case, other circumstances occur. Here there is one united charge of debts and legacies. So far as related to the debts it is confessed that there would be a charge on the specifically devised estate"—so, I understand, it is admitted here—"and in considering what is to be the operation of the charge with regard to the intention of the testatrix, it is impossible to separate the legacies from the debts. The legacies must therefore be a charge on the specifically devised estate."

461] *Now, I read this will precisely in the same way. First of all, I hold that the testator has charged the wife's patrimony as a debt to be raised with the other debts. He then says all

(1) 3 D. J. & S., 338; 1 N. R., 37; 10 W. R., 728.

(2) 3 Bli. (N.S.), 84.

(3) 7 H. L. C., 168.

the debts are to be raised out of the property, which means all his property, and it is, in my opinion, a charge upon the specifically devised property.

The next question arises upon the words, "In addition to this I leave her all my furniture, plate, linen, pictures, &c., in my house at Stratford-on-Avon at my decease, and the free occupancy of any house in my possession, for her life, free of any payments or charges whatever, after which the effects to revert back to the estate."

I think this clause restricts the gift of the furniture and effects to an interest for life only, as it is to revert back to the estate, but the direction that she is to have the free occupancy of any house in the possession of the testator will entitle her, in my opinion, either to reside in the house or to let it, as she may think fit.

Then the next question is, it being agreed upon all hands that the eldest son takes an estate tail male in the property which the testator calls Glencoe, whether he is tenant in tail in remainder or tenant in tail in possession. It was argued on the part of the plaintiff and others interested that he is tenant in tail in remainder, and not tenant in tail in possession, because it is given after a general disposition of the income of the testator's property. While on the other side, on behalf of the eldest son, to whom Glencoe is given, it is argued that it is excepted out of the general bequest altogether, and given to him immediately.

Undoubtedly the testator has expressed himself rather obscurely, but, looking at that which I think was his paramount object, I come to the conclusion that he did intend to except Glencoe altogether from this disposition and make a separate property of it. I do not think that is inconsistent with his intentions in favor of all his children, because it has been argued, and I think correctly — that if that clause applied it would have the effect of giving an estate in fee simple. It would be absurd, therefore, that he should give an estate in fee simple to all his children, and then give an estate tail in Glencoe to one of them. I think, therefore, though ill expressed; "all the property" means all the property except Glencoe; that Glencoe is to go to the eldest son and his heir male, which will give him [462 an estate tail in possession, with the remainder to his other brothers successively in tail in like manner. Therefore I am of opinion that, as regards Glencoe, the eldest son takes an estate tail male in possession.

Then the next question is, what is the effect of the bequest to the other children to whom bequests are given?

Now it has been argued in this case that a gift of the income

of real estate does not pass more than a life estate, but I think it is thoroughly settled that before the Wills Act a devise of the rents and profits passed a real estate for life. That being the case, that which would give a life estate before the Wills Act, by the 28th section of that Act, gives now a fee simple.

What, then, would have been the effect before the Wills Act of giving the income of the real estate? In my opinion there is no distinction whatever between giving the income of the land and the rents and profits of the land. The income means the rents and profits, and the rents and profits mean the income; they are convertible terms. Therefore I am clearly of opinion that a gift of the income of the land unrestricted, is simply a gift of the fee simple of the land. Then he has given to the children of J. H. Greener, naming them, "the income of my real property," that is, they take all the property except Glencoe as tenants in fee. It will therefore be declared, first, that the wife's patrimony is to be treated as a debt and a charge on the specifically devised property, as well as on the rest of the property; secondly, that the widow is entitled to the furniture for life, and that she is entitled to the freehold house in her occupancy, either to inhabit or to let; thirdly, that the devise to the sons and daughters of the property other than Glencoe gives the fee. Then as to the property called Glencoe, it is excepted from that gift, and is an estate tail in possession in Joseph Greener.

Solicitors for the plaintiff: Messrs. *Fallows & Whitehead*.

Solicitors for the defendant: Messrs. *Gregory, Rowcliffes, & Rawle*.

May 25, 1872, V.-C.M.

503]

*TALBOT V. EARL OF SHREWSBURY.

1869 T. 88.

[Law Reports 14 Equity cases, 503.]

Ejectment — Mesne Profits — Action against Executor — Money had and received — Proof of wrongful possession by Testator.

Earls A B, and C, being successive tenants in tail of property held under an inalienable Parliamentary title, and B having, after the death of A, entered into possession of the entailed estates, and, together with them, of certain leaseholds formerly in the possession of A, the executors of A, brought an action of ejectment against B, to recover possession of the leaseholds as part of A's estate. B, having died before trial of the action, another action was brought against C, the successor in title. C who was also executor of B, compromised the action on terms of giving judgment and buying the leaseholds at a certain price, with a further stipulation that £4000 should be allowed as a debt from B's estate in respect of rents received by B. Before the compromise a creditor's suit was instituted and a decree made for the administration of B's estate, which was insolvent. On a summons by A's executor to prove against B's estate for the amount of rents actually received by him:

Held, that the judgment given in the action against C. for wrongful possession by B, which could serve as a foundation for the admission by the executor as to mesne profits in an action for the same, being made after the decree.

This was an adjourned summons in a suit instigated by the creditors of Henry John, eighteenth Earl of Shrewsbury, for the administration of his estate, which proved to be insolvent.

The summons was taken out by the executor and Bertram Arthur, who were respectively the seventeenth Earls, for leave to prove as creditors the estate of Earl Henry John for the amount of the value of certain leasehold property at Broadstone, county of Oxford, held for terms of years renewable time under the principal and Scholars of Broadstone, Oxford.

In the year 1858, Earl Henry John, established the title and dignity of Earl of Shrewsbury, an entailed under a Parliamentary inalienable title to go along with the title. At the same time he effected a session of these estates and, together with them, the Broadstone leaseholds, which had been held by many of the family of Shrewsbury, and were believed to form part of the settled estates, and he received the rents of the Broadstone leaseholds till his death, which happened on the 14th of May, 1867. During the lifetime of Earl Henry John, the Broadstone leaseholds were raised by the executors of Earls John and Bertram to whether the Broadstone leaseholds really formed part of the settled estates, the executors of Earl John claimed the Broadstone leaseholds as part of his estate, and the executors of Earl Bertram claiming to have at least a lien upon them for £942 19s. 8d., which consisted partly of a fine on the Broadstone leaseholds and partly of an expenditure for repairs.

On the 14th of May, 1867, the executors of Earl Henry John commenced an action of ejectment against Bertram Arthur to recover possession of the Broadstone leaseholds. But the action had not been tried when Earl Henry John died, having appointed the present Earl and Captain Arthur as executors. The present Earl alone proved the will of Earl Henry John.

On the 9th of September, 1868, the executors of Earl Henry John and Bertram commenced a fresh action of ejectment against the present Earl for possession of the Broadstone leaseholds. In the subsequent arrangement a special case was stated for the consideration of the Court of Common Pleas to determine the issue. Before the special case had been heard, an arrangement was effected by certain articles of agreement between the executors of Earl Henry John and the present Earl, dated the 24th of August, 1870, and made between the executors of Earl Henry John and the present Earl, whereby the Broadstone leaseholds were to be sold, and the proceeds of the sale were to be divided between the executors of Earl Henry John and the present Earl.

John of the first part, the executors of Earl Bertram Arthur of the second part, the present Earl as executor of Earl Henry John of the third part, and in his own right of the fourth part, whereby, after reciting the above stated facts and the institution of the present suit, it was, amongst other things agreed that judgment should be entered up on the special case in favor of Earl John with costs, that the present Earl should purchase the same property from the executors of Earl John at a price mentioned in the agreement; and it was further provided as follows: "The amount of the rents and profits of the said Broadstone farm received by the said Henry John eighteenth Earl of Shrewsbury in his lifetime and for which his personal estate is now liable is hereby agreed to be the sum of £4000 and the sum of £4000 shall be allowed and certified in the administration of the estate of the said Henry John Earl of 505] *Shrewsbury in the suit of *Talbot v. Earl of Shrewsbury* as a debt due from him the said late Earl Henry John to the said Charles Robert Scott Scott Murray and Ambrose Lisle Phillipps de Lisle (the executors of Earl John) in respect of the rents of the said Broadstone farm received by the said Earl Henry John in his lifetime and applied to his own use and the said Charles Robert Scott Scott Murray and Ambrose Lisle Phillipps de Lisle shall be entitled to the said sum of £4000 or any dividend payable in respect of the same upon the execution of the conveyance or assignment of the said Broadstone farm to the said Charles John Earl of Shrewsbury." The suit was instituted and the decree made before the compromise of the special case.

By some inadvertence the plaintiff in the suit was not made a party to the agreement or informed of its existence, but the articles of agreement were carried into effect by the parties to them. The summons sought to make the estate of Earl Henry John liable for the amount treated as due by the articles of agreement.

Mr. Bovill, Q.C., and Mr. A. L. Smith, of the Common Law Bar, in support of the summons:

Where a man dies liable to an action for mesne profits for rents of property to which he is not entitled, though it is an action founded in tort, an action for money had and received will lie against his personal representative for what has been actually received by him, or a bill may be maintained for an account of what has been so received: *Caton v. Coles* ⁽¹⁾; *Pulteney v. Warren* ⁽²⁾; so also for goods improperly received by the testator: *Hambly v. Trott* ⁽³⁾, or for the produce of ore or timber or the like: *Powell v. Rees* ⁽⁴⁾; *Bishop of Winchester v. Knight* ⁽⁵⁾.

⁽¹⁾ Law Rep., 1 Eq., 581.

⁽²⁾ 6 Ves., 72.

⁽³⁾ 1 Cowp., 371.

⁽⁴⁾ 1 P. Wms., 406.

⁽⁵⁾ 7 A. & E., 426.

M.R.

Talbot v. Earl of Shrewsbury.

Here the judgment entered up against the sufficient evidence that the late Earl was a trustee to the leaseholds to give a right of action against the late Earl for money had and received; and the estate being under administration, to prove suit.

Mr. *Glasse*, Q.C., and Mr. *Kekewich*, for the plaintiff; Mr. *Bristowe*, Q.C., and Mr. *Everitt*, for the defendant, took no part in the arguments.

Mr. *Cotton*, Q.C., and Mr. *Davey*, for the plaintiff, called upon.

SIR R. MALINS, V.C. :

This is a claim by the representatives of the seventeenth Earls of Shrewsbury against the eighteenth Earl, to recover the amounts of rents received in respect of property of which it is contended that he possessed himself.

To decide this question an action of ejectment was brought against him in the year 1867, but he died before judgment was obtained. A new action was then commenced against the present Earl, but it was not brought to trial. It was a technical case, but before it was heard a compromise was entered into, which the present Earl paid a certain price for the possession of the property, and a sum was agreed to be paid which would have been due for mesne profits.

Now if a judgment had been obtained against him in the action of ejectment, he would have been liable for the rents received by him as mesne profits. But though an action for mesne profits is an action in which a man dies liable to such an action, the action against his executors for money had and received is not such an action, and much of the rents as have actually been received by him during his lifetime. But the difficulty here is, that there was no judgment obtained against the late Earl showing that he had been wrongfully in possession of this property, and that he had given a right of action against him for mesne profits. The action against the present Earl had resulted in a judgment against him, showing that the late Earl must have been in wrongful possession, that might have been a sufficient basis for this claim. But I cannot treat a wrongful possession as a basis for an action against the late Earl because the present Earl has been in possession of the property on the basis of a compromise of an action, to which he was bound by his own wrongful possession against himself.

I am therefore of opinion that the plaintiff has not taken the very first step, which is that of proving that the

wrongfully received the rents. There is further no admission of liability, for the present earl could not make an admission as executor which would bind his predecessor's estate after a decree in the administration suit; and he very properly takes no part on the present question. The only other persons are the legatees, who have no interest in question, the estate being insolvent, and the plaintiff, who of course cannot give an admission.

There is therefore neither evidence nor admission that the late earl had any wrongful possession of this property, and on these grounds the summons fails. The claim will, therefore, be refused, and the costs of all parties except the claimants will be out of the estate.

Solicitors: Messrs. *Young & Jackson*; Messrs. *Parker & Pagden*; Messrs. *Austin, De Gex, & Harding*; Messrs. *Farrer, Ouwry, & Co.*

V.-C.M., July 30, 1872.

522]

*HOARE V. BREMRIDGE.

[Law Reports, 14 Equity Cases, 522.]

1872 H., 141.

Policy of Assurance—Conflict of Evidence—Jurisdiction—A Court of Law the Proper Tribunal.

A bill having been filed by an insurance company to cancel a life policy as obtained by misrepresentation, a motion was made to restrain an action upon the policy which was commenced immediately after the filing of the bill:

Held, that this Court had complete jurisdiction, but that the question would be more suitably tried before a jury; and motion refused accordingly.

THIS was a bill filed by the Sun Life Assurance Society praying a declaration that a certain policy of assurance was obtained by Mrs. Formby by concealment and misrepresentation, and that the same was void, and ought to be delivered up to be cancelled, and that in the meantime the defendant Thomas Julius Bremridge, the representative of Mrs. Formby, might be restrained from bringing any action against the plaintiff or the society in respect of such policy.

From the statements in the bill it appeared that the policy in question, upon the life of Mrs. Formby for £5000, was effected on the 30th of December, 1870, upon the application of Thomas Lyle, M.D.

The usual papers sent by the insurance office requiring particulars as to the life of the person intending to effect a policy were filled up in the following manner: Mrs. Formby stated that she was twenty-seven years of age, that her usual medical attendant was Arthur Kempe, whom she had last seen in the previous 523] *month of April, when he attended her during her confinement. This form was accompanied by the following certificate

"I do hereby certify that I am now in good health, and ordinarily enjoy a good state of health, that I am temperate in my habits of life, and that I am not in any circumstance tending to shorten my life or to render an assurance on it more than usually hazardous. And I do hereby certify that I have not had occasion for medical assistance during the last two years, excepting for some passing ailments. Also I know no other medical man so competent to certify as to my health, habits, and temperance as Arthur Kempe, to whom I have referred. Witness my hand and seal in the name of Thomas Lyle, M.D., Vice-Chancellor of Exeter." This declaration was signed on the 8th of December 1870, and was indorsed by Thomas Lyle, who stood as a surety in the life of Mrs. Formby to the full amount of the sum to be insured; that the said Mrs. Formby was in good health, excepting a passing ailment; that she was in a good state of health, that she was sober and temperate in her habits of life, and that he was not aware of any circumstance tending to shorten her life or to render an assurance on it more than usually hazardous.

Dr. Kempe, the medical practitioner referred to, sent a reply to the questions put to him by the assurance company on the 17th of December, in which he stated that he had attended her in two severe confinements (one mental), from which she made quick recovery, and twice for slight stomach derangement. That her general health was good, that she was not afflicted with any disorder of any kind that he was aware of, and that he knew of no circumstances which might be considered as tending to shorten her life or to render an assurance on it more than usually hazardous. There were also certificates of the general health of Mrs. Formby from two gentlemen, who were not medical practitioners. Mrs. Formby was also examined by Dr. Budd, the medical referee of the assurance company, who reported that he found her to present every indication of a healthy constitution, that she appeared to be in perfect health, and considered her to be quite eligible for life insurance, and that he would be a first class life.

*Upon these certificates the policy was effected, and was executed on the 30th of December, 1870.

Mrs. Formby made her will in January, 1871, and bequeathed the policy of assurance and all the property to Thomas Lyle, and appointed the defendant, Bremridge, and another person, since deceased, as executors of her will.

She died on the 1st of February, 1872, and an assessor was appointed on the 1st of March, 1872.

shortly afterwards made to the insurance society for payment of the amount of the policy, which they expressed themselves ready to do on the 21st of June inst. The society had recently, and since the promise to pay, discovered that Mrs. Formby at the time of effecting the policy was not in a good state of health, and that she was afflicted with a disorder tending to shorten life, and with serious disease, and that it was untrue that she was not aware of any circumstances tending to shorten her life or to render an insurance on it more than usually hazardous.

The charges in the bill entered into minute details respecting the disease from which Mrs. Formby was suffering when the proposal was made for insuring her life, and which had arisen from injuries received in her last confinement. That in the month of April or May, 1871, she came to London to obtain medical advice and treatment in consequence of the injuries she had so sustained, and was for some time under the treatment of Dr. West, Dr. Hewitt, and Dr. Tyler Smith; that a surgical operation was performed upon her in November, 1871, from which she never fully recovered, and that in consequence of such operation, and as the result of the injuries sustained by Mrs. Formby in her last delivery, an abscess was formed, from the effects whereof she died on the 1st of February, 1872.

It was also alleged that when the proposal for insuring her life was made by Mrs. Formby she was well aware of the state of her health, and in order to induce the society to grant the policy she concealed the fact of her not having recovered from her last delivery, and that she did not inform the society or Dr. Budd that she was still suffering from disease; that if they had been so informed they would have refused to insure her life or to undertake any risk upon such a life, but they had no information or intimation of such matters till after the death of Mrs. Formby.

525] *This bill was filed on the 14th of June, seven days before the day on which the society proposed to pay the amount of the policy, and an action was commenced against the society by the defendant Thomas Bremridge on the 21st of June.

Mr. Cotton, Q.C., and Mr. Bush, now moved for an injunction to restrain the action:

This is a bill to set aside a policy on the ground of concealment and misrepresentation. There is perfect jurisdiction in this Court to decide such a question, which depends upon fraud, and we desire to have the case tried here, where we believe that justice will be better and more speedily administered than in the Court of Law. This bill was filed on the 14th of June, and the action was not commenced till the 21st, therefore, as we were first in choosing our forum we have a right to come now

and restrain the action. The bill is filed under circumstances very similar to those in the *British Equitable Insurance Company v. Great Western Railway Company* ⁽¹⁾. In that case a representation was made by the person insuring his life, but before the premium was paid he consulted another medical man, who told him that his life was in peril, and without communicating that fact he paid the premium and the policy was executed. A bill was filed by the insurance office to have the policy declared void, and to restrain any proceeding at law upon the policy. Your Honor there decided that the policy was void, and the Court of Appeal affirmed that decision. An interlocutory injunction had been granted, but it does not appear that it was opposed. In another case, upon a bill filed by the British Provident Life Assurance Company, your Honor also set aside a policy, on the ground that the person insured had been refused a policy by several other offices, and had not communicated the fact to the office which had accepted him. In this case it is so clear upon the evidence that the statements made by Mrs. Formby were not in accordance with the facts which she must have known as to the state of her health, that there can be no necessity for sending it before a jury. The jurisdiction of this Court in questions of policies is entirely settled by the case of *Traill v. Baring* ⁽²⁾.

*Mr. Glasse, Q.C., and Mr. C. Hall, for the defendant : [526

We do not question the jurisdiction of the Court in cases of fraud. We admit that this Court has concurrent jurisdiction with the Court of Law; but we say that a question of this nature, depending as it does, entirely upon a conflict of evidence, will be better tried before a jury, where the witnesses are examined *vivâ voce*, and cross-examined in open Court, than in the Court of Chancery, where the evidence will be taken before the Examiner.

These cases arising upon policies of assurance are more particularly appropriate to the form of trial at common law, where the medical testimony can be thoroughly sifted and the truth of the matter elicited.

The accident of the bill having been filed before the action was commenced has nothing whatever to do with the case. The action was commenced on the very first day it could be commenced, since the insurance company proposed to pay the money on the 21st of June, six months after the death of the insured. In a recent case of *Freeman v. Greenwood*, before Vice-Chancellor Wickens, in which the policy was effected under circumstances similar to those in the case of the *Planet Insurance Company v. Greenwood*, decided by your Honor in February last,

(1) 38 L. J. (Ch.), 132, 314.

(2) 4 Giff., 485; 4 D. J. & S., 318.

the Vice-Chancellor said he thought it made no difference that there had not been any action commenced when the bill was filed by the company, and he refused the motion upon the evidence, saying that the question would be more conveniently tried in an action if the defendant thought fit to bring one against the company.

The cases in which this Court has decided the question between the parties have been brought on at the hearing, when all the evidence had been gone into. This case is in a very different position, no evidence has yet been taken, and no expense incurred beyond the filing of the bill. *British Equitable Insurance Company v. Great Western Company* ⁽¹⁾ was decided at the hearing, and so was *Traill v. Baring* ⁽²⁾; and in the *Planet Insurance Company v. Greenwood* your Honour decided that it was a case to be tried at law, and you refused to restrain the action. All that was done in those cases was to remove some [527] difficulty out of the way *in order that the case might go on at law. And in *Lee v. Lancashire and Yorkshire Railway Company* ⁽³⁾ great importance was attached to the advantage of having a case of conflicting evidence tried at law where the witnesses can be seen and their demeanor observed.

But supposing this case were brought to a hearing, it would then be competent for the Court, under Sir John Rolt's Act, to refer the question to a Court of Law if it shall think that would be the most convenient tribunal, and we have every belief that this course would be taken; and if so, all the expense of the evidence in Chancery would be rendered useless. There is no contention in this case which may not be as easily urged at law as in this Court, and no ground of equity which is not strictly within the jurisdiction of a Court of Law.

Mr. Cotton, in reply:

It would be denying and giving up the jurisdiction of this Court if we are bound by the result of the action at law. The plaintiffs in filing this bill have a right, if they think fit to do so, to say that this Court having a jurisdiction on the question of fraud shall order the policy to be delivered up to be cancelled.

SIR R. MALINS, V.C.:

This is a motion by the Sun Life Assurance Society against the representative of Mrs. Formby, a lady whose life was insured in that office for the sum of £5000, to restrain an action which has been brought on the policy. Mrs. Formby died on the 1st of February, 1872; and it appears that the usual application having been made for the payment of the sum assured, the office,

⁽¹⁾ 88 L. J. (Ch.), 132, 314.

⁽²⁾ 4 Giff., 485; 4 D. J. & S., 318.

⁽³⁾ Law Rep., 6 Ch., 527.

then having no suspicion that there had been any fraud with them, wrote to Mr. Bremridge, the executor, by, on the 8th of April, 1872, informing him that the sum under this policy would be paid on the 21st of April, the life having expired on the 1st of February, the time from February to April to ascertain whether there was anything wrong. But it does not follow that the plaintiff was necessarily be successful in discovering that any impropriety had been practised on them. And *for the purpose of making a decision on the motion I assume that it may turn out that the representations made by the office, namely, that the policy was to effect the policy by fraud, that is, by the concealment of facts which ought to have been communicated to the health of the life assured, and that the policy was, and indeed positive misrepresentation, of which they ought to have been told, may be perfectly correct. This policy is one which may turn out to be void on the ground of the office, and by the course of communications to the parties, no action could have been brought on the 21st of June at the earliest. That is an admitted fact. On the 14th of June, seven days before that time, the bill was introduced, which prays that it may be declared that the policy obtained by Mrs. Formby by concealment and misrepresentation, and that the same is void and ought to be declared void, cancelled, and that in the meantime Mr. Bremridge be restrained by injunction from continuing or prosecuting the action against the plaintiffs, and that the defendant make satisfaction of this suit.

Notwithstanding the filing of this bill on the 14th of June, Mr. Bremridge commenced an action against the plaintiffs on the 21st, the very earliest day that he was enabled to do so. Now the question is, whether that action is to go on, or whether I am now to stay it upon this motion.

The case certainly raises considerations of very great importance. That there is concurrent jurisdiction in the Courts of Common Law on all matters of fraud is a well-established principle, and has not been questioned. It is perfectly clear in my mind that if this were the hearing of the cause I should decide the question in accordance with what I decided in *British Equitable Assurance Company v. Great Western Insurance Company* ⁽¹⁾. There the question was whether a policy was void or invalid in consequence of the person assured not having communicated a fact to the office which he was bound to communicate, namely, that subsequent to the acceptance of the policy by the office he had consulted another medical

(1) 38 L.J. (Ch.), 132, 314.

given an unfavorable opinion of his life. That fact being withheld from the office, I *held, and in that holding I was confirmed by the Court of Appeal, that that was a concealment of a fact which vitiated the transaction, and accordingly I ordered the policy to be delivered up to be cancelled; and I further decided, and in that I was also confirmed, that this Court had complete jurisdiction over the matter just as much as a Court of Law. In the present case I am of opinion, also, that this policy being impugned on the ground of fraud, it is within the jurisdiction of this Court as much as within the jurisdiction of a Court of Law to decide whether the policy is or is not valid.

But it must be borne in mind that the ordinary remedy under a policy of insurance, whether it be a marine, a life, or a fire insurance, is by an action at law. And I think it ought to be well understood, and it is most important, in my opinion, that it should be understood, by all persons who grant policies of insurance, whether underwriters or insurance offices, that if any question arises upon policies, unless there are extraordinary circumstances, the proper tribunal to decide those questions is a Court of Law.

If this practice is to be encouraged, there is not a single marine insurance which might not be brought to this Court to be decided. There was a case lately tried as to the validity of an insurance on a ship, and it was objected that the policy was void, because the captain, being the agent of the assured, had scuttled the ship. If Mr. Cotten's contention is right, that this Court, because a bill is filed immediately before an action can be brought, has seizure of the matter, and has jurisdiction, that question — which never could be properly tried in this Court on written evidence, and upon which no satisfactory conclusion could have been arrived at, except by the examination of witnesses — still, if the bill had been filed by the underwriters before the action was brought, it must necessarily have been tried in this Court. So on a fire policy, it is very true that this Court has concurrent jurisdiction, and in a case lately before me, in which a bill was filed by a person who had insured his premises for one month, in the European Assurance Society, the society, by every device that an office could have recourse to, endeavored to get out of the liability of paying the policy. But, upon a full hearing of the evidence, I made a decree against them, with costs, because I then satisfied myself that in all these cases this Court has concurrent jurisdiction with the Courts of *Law. That was a case in which the question was raised for the first time at the hearing of the cause, and undoubtedly if this were the hearing of the cause I do not think I should consider it proper to send these parties to a jury. But

it is of the highest importance that it should according to my view at all events, that it tent for underwriters or insurance officers, dis has become due, to file a bill in this Court, and right, call upon this Court, by written evidence, away from a jury, which is the proper and the tribunal, in my opinion, to decide such a case.

In the observations, therefore, of the Lords J *Lancashire and Yorkshire Railway Company* ⁽¹⁾, concur—that in all these questions it is most should be tried where the witnesses are seen, meanor is witnessed, where the parties have a of cross-examination—not such a cross-examination before a special examiner, or before the ordina the Court, or even that kind of cross-examination have here, when the parties have made up their n ing themselves to a written affidavit, but upon the witnesses are brought before the jury for th examined—it is, in my opinion, most importa dence in such cases should be taken in that fori

Now what are the grounds that have been urg stopping this action? It is said that this lady pressed the fact that she had been attended by a man, whose name is not given, that she was su diseases in consequence of her confinement, w statement in the bill, appears to be so. All that n for saying that this policy is void, but where wou culty of bringing that before a jury? The plaint on the policy will, I apprehend, put in the policy will set up their defence, and every word of defe can set up here will be equally effective for them defence will be, as it is here, that there was a facts which ought to have been communicated to lady, instead *of being in a good state of health the most dangerous condition, and that if she wa way again, it was highly improbable that she wou her confinement with her life. If all that is tri doubt that it would vitiate the policy. But if ti culty is there in having it tried by a jury? The medical man who attended her; they will make t she had these diseases which were not communica make him prove that the statement is untrue in w “I do hereby certify that I am now in good hea do ordinarily enjoy a good state of health, and t had occasion for medical advice or assistance d

(1) Law Rep., 6 Ch., 527.

two years excepting for confinement and passing ailments." If there is any truth in that, they will call the medical man who attended her, not for passing ailments, but a disease of the most dangerous kind, which she could not be subject to without her life being in the highest degree exposed to danger.

Now, what equity is there in this case? Why is it expedient that such a case should be transferred to this Court to be tried on written evidence, when it can be so readily tried in the ordinary way by the witnesses being examined?

In the case that was before me of the Planet Insurance Company so recently as the 8th of February last, the Planet filed a bill and moved to restrain an action which had been brought against them on a policy of insurance. The objection taken was as to the validity of the policy. It was a fraud of this kind, that while one man professes to insure his own life they said it was another man who had insured his life, and it would be a fraud on them to make them pay on a policy which was void at law. The action had been commenced, and I decided it on two grounds—first, that such a question was the proper subject for trial at law, and secondly, that the action having been commenced before the bill was filed, the person claiming under the policy had selected his forum and there was no ground to sustain the motion. It appears that since my decision a similar case has been before Vice-Chancellor Wickens, in which no action had been brought. Mr. Kekewich has been kind enough to send me the bill in that case of *Freeman v. Greenwood*, which was against the same defendant as in the Planet case, and on 532] *the same life which had been assured in the General Assurance Office. Mr. Freeman was the officer of that company, and before an action was brought, the office, by Mr. Freeman its officer, filed a bill to restrain any action. Vice-Chancellor Wickens, as I understand, took the same view as I have taken of this case. He thought it much more expedient that such a question should be decided by a jury, although no action had been brought, and I do not understand that he had the slightest doubt as to this Court having complete jurisdiction on such matters, as I have no doubt. Therefore, acting on the perfect conviction that this Court has that jurisdiction, which I have exercised more than once—it is not because the Court has not jurisdiction, but because I think it is most inconvenient to exercise it—considering also that the action has only just commenced, and that nothing more than the filing of the bill has been done, I think I shall be more likely to do justice by refusing the motion than I can do by staying the action. Upon those grounds, therefore, I refuse the motion, and the costs will be costs in the cause.

Solicitors for the plaintiffs : Messrs. *Ranken,*
& Longbourne.
 Solicitor for the defendants : Mr. *J. Elliot &*

V.C.B. June 6, 7, 8, 11, 20, 1872

*HIRST v. DENHAM.

[Law Reports, 14 Equity, 542.]

1872 H. 118.

Trade Name—Piracy—Injunction.

A manufacturer who has produced an article of merchantable cloth and applied to it a particular fancy name, and a particular mark, under which name and mark it has obtained a market, acquires an exclusive right to the use of such name and mark, entitled to restrain all other persons from using such name and mark on articles similar in kind and appearance, although he may not be the first inventor of the article. If the use of such name and mark by another person than the first inventor, has been adopted for the purpose of selling goods of an inferior quality, though of similar external appearance, so that purchasers may be misled into the belief that they are buying the goods of the first inventor, the injury to the first inventor is one for which he is entitled to compensation in damages, and relief by injunction.

MOTION for an injunction to restrain the defendant from selling, &c., cloth under the names of "Turin," "Leopold," or "Liverpool," and from using the said names for the purpose of describing any cloths sold by them, and from affixing to any cloths manufactured or sold by them a ticket being an imitation of, or similar to, or differing from, the ticket used by the plaintiff, and from selling any cloth bearing any ticket being an imitation of, or only colorably differing from, plaintiff's ticket, or the aforesaid name used by plaintiff, or any of them.

According to the case made by the bill, the defendant is a wholesale manufacturer of woollen cloths at Huddersfield, among others, of cloths known in the trade at sixpence a yard, and of trousers, in the manufacture of which he has exercised personal superintendence and established a reputation. To several of the patterns of cloths made by him he had applied fancy names, not before used, for the purpose of distinguishing them; and cloths made by him, and thus designated, had acquired celebrity, and were recognized and known as cloths of plaintiff's manufacture, and of a superior quality. Of these fancy names, which were "Turin," "Sefton," "Leopold," and "Liverpool," the name "Turin" was first adopted by plaintiff as the distinguishing name of cloth of a particular pattern and original design; and this name had ever since been used by him to distinguish the cloth manufactured by

pattern. The name "Sefton," was in like manner adopted by the plaintiff, in 1863, to distinguish another, pattern of cloth manufactured by him; and the names "Leopold" and "Liverpool" were adopted for the same purpose in 1870 and 1871, and had been ever since used by him. To distinguish the colors of the cloths so manufactured the plaintiff employed numbers instead of specifying the particular colors of the patterns, and since 1860 cards or tickets, in a form designed for him in that year, had been affixed to the pieces of cloth sold by him.

This ticket, which was alleged by the bill to be so well known and recognized in the market as plaintiff's trade mark that until the acts of the defendants complained of no person other than the plaintiff, had ever attached to a piece of cloth any ticket resembling that of plaintiff, was thus described: "The ticket is about $1\frac{1}{2}$ inches wide and 3 inches long. Near the top the word 'wooded' is printed in gold letters, and immediately under it is an embossed gilt curved line, and the word 'color' is printed in small gilt letters underneath it, with a dotted gold line for the number to be filed in. Below that gold line there are several spaces. The ticket when used is filled up with a distinguishing name of the particular cloth to which the ticket is attached, and the number denoting the color and length of the piece."

With the bales of goods sold by plaintiff an invoice was sent containing the price, and attached to the bales a ticket in the form described, notifying the name and color of the cloth and the number of yards contained in the bales. The bill alleged that the plaintiff had become entitled to the exclusive user of the several names mentioned, as distinguishing names of the cloths of the different patterns manufactured and sold by him, and also to the exclusive user of the ticket for the purpose of marking his goods.

The defendants, of whom Dearnly had been in the employment of the plaintiff from 1856 until 1863, entered into partnership in 1868, and carried on the trade of cloth manufacturers near Huddersfield, having a warehouse in that town for the sale of their goods. The bill alleged that for some time past they 544] had been *using the names "Turin," "Sefton," "Leopold," and "Liverpool," to designate cloths manufactured by themselves of patterns similar to plaintiff's cloths, though of inferior quality, and has sold cloths so manufactured by them under the names used by the plaintiff for designating his cloths, and that defendants had also adopted the same numbers as were used by plaintiff, and in the same way, for distinguishing the colors of their cloths. The bill further stated that plaintiff had also recently (March, 1872) discovered that the defendants had

caused to be printed, and had for some time past been using, tickets precisely similar to the tickets so used by him, except that the defendants' tickets were slightly different in size, and that the word "color" was not printed thereon, but written in with ink; and that defendants had affixed to the cloths manufactured and sold by them tickets resembling the plaintiff's tickets, and filled in with the names adopted by plaintiff to designate his goods, and with numbers identical with those used by plaintiff to distinguish colors of his cloths, which defendants used for the same purpose; and that by means of such names and the use of the tickets defendants were enabled to pass off their goods as goods of plaintiff's manufacture, and that the use of such names and tickets was calculated to deceive, and in some instances had deceived, drapers, tailors, and others who were the ultimate purchasers of the defendants' goods, into the belief that such goods were in fact goods manufactured by plaintiff.

According to the evidence in support of plaintiff's case, the cloths known in the trade by the names of "Turin," "Sefton," "Leopold," and "Liverpool," commanded a very large and extensive sale throughout Great Britain, and ever since the time they were first made by plaintiff had been known and distinguished by the above names exclusively, not only in the plaintiff's mills and warehouse, but by the merchants who purchased from him, and also by tailors and clothiers throughout the kingdom; and all ordinary merchants in purchasing a piece of Turin would take it for granted they were purchasing the cloth of the plaintiff bearing that name. The application of names to cloths was stated to be not a common thing with manufactures, but to be a specialty with plaintiff, whose cloths were known by their names and in no other way. Evidence was also given of the inferior quality of the *cloths made and sold [545 by defendants under the above names, and that the cloths made by plaintiff and those made by defendants were so similar in appearance "that ordinary tailors and clothiers might well purchase the cloth of the defendants supposing it to be the cloth of plaintiff; and any of these persons having been in the habit of purchasing the plaintiff's cloths, and knowing them by their names, would take and accept the cloths of the defendants, sold under the same names, and conclude that they were procuring cloths made by plaintiff." Close examination would sometimes be necessary to detect the difference between the cloths of plaintiff and defendant, which arose in the difference of the material used in the manufacture. It was also alleged in the bill and stated in evidence, that by means of the said names and the use of the said tickets, defendants were enabled to pass off

their goods, and to get them into the hands of retail purchasers as goods of plaintiff's manufacture, and that the use of the names and tickets were calculated to deceive, and in some instances had deceived, drapers, tailors, and others, who were the ultimate purchasers of defendant's goods, into the belief that such goods were in fact goods manufactured by plaintiff.

The case made on behalf of the defendants was, in substance, that the names which plaintiff had adopted for his goods merely described the patterns of the manufacture, in which patterns plaintiff neither had nor claimed any exclusive right or property; that the names having been by plaintiff conferred upon the thing manufactured, became *publici juris*; and that, by the custom of the trade as well as by law, the defendants, being entitled to use the patterns, were also entitled to use the names by which those patterns were designated. They denied that by means of the tickets or otherwise plaintiff had acquired any distinctive trade mark. They also denied that by such use as they had made of the tickets employed by them, they had intended to imitate, or had in fact imitated, the tickets used by plaintiff; and they positively denied any intention of injuring plaintiff in his trade, or any other than the lawful intention of competing with him fairly and openly in the manufacture and trade in which he and they were engaged.

In his affidavit the defendant Dearnley stated, that at the time 546] *he left plaintiff's service (in 1863) the patterns known as "Turin" and "Sefton" were public property, and the several firms with whom he had since been connected sold these cloths under these names freely, openly, and as of right; and especially Messrs. J. Heap & Brothers, into whose service defendant entered immediately on leaving plaintiff's service, sold in large quantities whilst he was with them (a period of two years) the cloths called "Turin" and "Sefton," and applied those names to them. The names "Turin" and "Sefton," as applied to two of the patterns of cloth, had been in common and general use in the trade ever since defendants commenced business together; and for all that time they had been making and selling these cloths openly and of right under those names. Other manufacturers had done the same.

According to the common usage of the cloth trade, all the patterns and styles of cloth introduced into the market by the various fancy cloth manufacturers were, unless protected by a declared and published registration and trade-mark, considered public property as soon as they appeared in the market. If any pattern was introduced by any name, that name was, as a matter of course, used and adopted by all who chose in following the pattern. If a pattern became a favorite one, it was copied by

the trade extensively and in all qualities; th into common use, and no exclusive right them had, so far as defendants could ascertain in the trade. Instances were given of various defendants themselves to patterns, well known of the patterns so called became popular, then adopted by every one who chose to manufacture by the mere name of a cloth that it gained in the market, but either by the name and reputation of the manufacturer, or by the style and merit of the cloth.

The defendants also denied that, in carrying out their attempts, or authorized, or been attempts to pass off cloths manufactured by them as manufactured by plaintiff, and insisted that that effect made by the bill was wholly untrue, and that their goods were of inferior quality than those of plaintiff, and stated that they were in the habit of selling to ignorant or unskilled persons, but to skilled buyers, members of, or employed by, wholesale trade, not to be deceived or misled by any mere name or style of the ticket attached thereto. With respect to the defendants' goods were at first disposed of exclusively, or nearly so; and until that arrangement they were not in the habit of using tickets, and commenced an open trade, and it became known that their goods, they applied to a stationer in London to select from his stock a ticket, which they used openly and as of right, and entirely without reference to the style or design of ticket used by plaintiff, and without knowledge that he had adopted or was using it.

Amongst other affidavits on behalf of the defendants, Mr. Wright Mellor, Mayor and President of the Chamber of Commerce of Huddersfield, and engaged in the woolen trade, manufacturer and a merchant. He stated:

"It is a common practice in the woollen trade to introduce styles or patterns of cloth to have distinguished names given to them, either by the first makers, or by others afterwards, and as the style or pattern becomes known and is adopted and comes into general use in the trade, in my experience known many distinguishing names become introduced and grow into common use in the trade, as 'Tweeds,' 'Meltons,' 'Presidents,' 'Doesk' and numerous others—but no property or exclusive right in such names is ever considered to attach to the maker, nor have these names any special application to any particular manufacturer, unless his own name is connected with them."

The terms 'Turin' and 'Sefton' are known names in the trade, and have been in growing use for some years past. They do not, so far as I know, apply to the plaintiff's manufacture in particular, unless his name is added, but to the cloths of that description by whomsoever made. It is well known that other persons besides the plaintiff are makers of such cloths. I have read the paragraphs in the plaintiff's bill asserting his claim to the exclusive use of the words 'Turin,' 'Sefton,' 'Liverpool,' and 'Leopold,' as distinguishing names of his cloths; and I say, speaking from a long experience of the woollen cloth 548] *trade, that such claim is quite inconsistent with the general practice and usage of such trade."

There were fourteen other affidavits by persons engaged in, and well acquainted with, the woollen trade, to the same effect, denying that manufacturers, by giving fancy names to their manufactures, have thereby acquired an exclusive right to the use of such names, and denying that such names as plaintiff uses constitute or can be considered as being a trade mark. Evidence was also given that Turin and Sefton cloths had been for some years made and sold under those names by several manufacturers besides plaintiff and defendants, and especially by a manufacturer of Huddersfield named Brook, for the last six or seven years quite openly.

The plaintiff had filed affidavits in reply, in which he stated, that, until he read the affidavits on behalf of the defendants he never heard of the use of the names "Turin," "Sefton," &c., in the manufacture or sale of their goods by the firms mentioned. Had he known of the use of the said names in connection with the manufacture or sale of cloth similar in appearance to his own by any person, he should at once have complained of such use, and have taken steps to prevent the adoption thereof, and in fact had done so now. In answer to the statements of Mr. Mellor and others as to the common right to use these names from the variety of names, such as "Cheviot," which were used as of common right, it was alleged that those names ("Cheviot." &c.) were in no way descriptive of any particular cloths, or of the mark of any manufacturer, but were simply descriptive of large classes of goods made all over the woollen market in all kinds of styles, designs, and colors, and had no analogy or parallel whatever to the names given by plaintiff to his cloths — such names being descriptive, not of any classes of goods, but only of specific goods, and relating to the one article to which such names have been respectively applied. It was also explained that the plaintiff had not applied his own name to the patterns from the objections entertained by merchants to such a course.

V.-C.B.

Hirst v. Denham

Mr. Kay, Q.C., Mr. Theodore Aston, Q.C., plaintiff, in support of the motion, cited *So* **Croft v. Day* ⁽²⁾; *Sykes v. Sykes* ⁽³⁾; *Edelsten v. Millington v. Fox* ⁽⁵⁾; *Glenney v. Smith* ⁽⁶⁾; *Brook v. Andrew v. Bassett* ⁽⁸⁾; *Kniaham v. Bolton* ⁽⁹⁾; *Furina v. Silverlock* ⁽¹¹⁾; *Lee v. Haley* ⁽¹²⁾; *F. Wotherspoon v. Currie* ⁽¹⁴⁾; *Ainsworth v. Wams*

Mr. Eldis, Q.C., and Mr. Bugshawe, for the *Canham v. Jones* ⁽¹⁶⁾; *Leibig's Extract of Mealbury* ⁽¹⁷⁾; *Leather Cloth Company v. Americanpany* ⁽¹⁸⁾ *Hall v. Barrows* ⁽¹⁹⁾; *Burgess v. Burg*

Mr. W. Druce watched the case on behalf manufacturers at Huddersfield.

June 20. SIR JAMES BACON, V. C., after stating the evidence, continued:

The facts being so proved (as the plaintiff has it remains to be considered whether the relief plaintiff is that to which he is entitled. The law has been long established. The cases which I have been very numerous, and present a great circumstances. Most, if not all, of these have been commented upon; but from the first of the *Howe* ⁽²¹⁾ be the first) to the last, which is *F* recently before the Lords Justices, it has been in Courts of Common Law as in Courts of Equity a manufacturer has produced an article of merchandise by a particular name and vending it with a particular mark has acquired an exclusive right to the use of that name and mark, which becomes what is usually called a trade mark and is entitled to prevent all other persons from using that name and mark to denote articles of a similar kind and to this must be added, that if the use of that name and mark by any other person than the first inventor adopted for the purpose of selling goods of an exactly similar though of similar external appearance, or which may be misled into the belief that they are bona fide of the original inventor, the injury done to the

⁽¹⁾ Cro. Jac., 468, 471; Popham, 143.

⁽²⁾ 7 Beav., 90.

⁽³⁾ 3 B. & C., 541.

⁽⁴⁾ 1 D. J. & S., 185, 203.

⁽⁵⁾ 3 My. & Cr., 338.

⁽⁶⁾ 2 Dr. & Sm., 476.

⁽⁷⁾ 1 H. & M., 447.

⁽⁸⁾ 33 L. J. (Ch.), 561.

⁽⁹⁾ 15 Ir. Ch. Rep., 75.

⁽¹⁰⁾ Law Rep., 13 Eq., 421.

⁽¹¹⁾ 1 K. & J., 509, 515; 4 K. & J., 650.

⁽¹²⁾ Law Rep., 5 C.

⁽¹³⁾ Ibid., 9 Ch., 6.

⁽¹⁴⁾ Ibid., 5 H. L.,

⁽¹⁵⁾ Ibid., 1 Eq., 5.

⁽¹⁶⁾ 2 V. & B., 218.

⁽¹⁷⁾ 17 L. T. (N.S.),

⁽¹⁸⁾ 4 D. J. & S., 1.

⁽¹⁹⁾ 33 L. J. (Ch.),

⁽²⁰⁾ 3 D. M. & G.,

⁽²¹⁾ Popham, 144.

one for which he is entitled to compensation at common law and to relief by way of injunction in equity. In this case it is not disputed that the plaintiff is the first inventor of the patterns of three of the four descriptions of cloth which have been mentioned; that he for the first time called each of the four by a new distinctive appellative, by which they have become known in the trade as his manufacture; that he has sold all such as he has sold by those names; each bale being accompanied by a ticket on which is written the name by which he had first designated each of the several articles; and that by the name and the ticket the commodities are known by the purchasers, and are known to be of the plaintiff's manufacture.

The defendants have insisted, and several of their witnesses have stated, that the invention and use of the names by the plaintiff confers upon him no such exclusive right as he claims; for that the patterns not having been registered, it became, as it undoubtedly did, the right of any one to copy or imitate the patterns; and that the right to call the commodity by the only name which had been given to it was inseparable from the right to use the patterns, and therefore that the plaintiff had no right to restrain the defendants from using the name. And it was said by several witnesses for the defendants that it is the common usage and custom of the trade, when a like commodity has come to be known by any particular appellation, for any manufacturers who are so minded to manufacture the commodity and to call it by the name by which it has come to be known; and upon this topic reference was made to several articles of manufacture, such as "Melton" and "Doeskin" and the like, the names being *publici juris* as soon as they are bestowed upon the 551] articles to which they are applied. Without *stopping to consider the validity of any such supposed custom of trade, I think the principle contended for has no application to the present case; for in the instances referred to, as is explained in one of the affidavits I have mentioned, the names refer, not to patterns, but to a general description of goods.

Instances were adduced by defendants of two of the articles, "Turin" and "Sefton," made and claimed by the plaintiff, having been made by other manufacturers, and called by the same names, without objection on the part of the plaintiff; and upon this it was insisted that he had abandoned or lost, even if he ever possessed, all exclusive right to the names. There are, however, only three manufactures named who are said to have thus acted. Two of them — Mr. Crowther and the manager of Mr. Brown — say they have done so for several years past. The third is a Mr. Heap, who, however, has not made an affidavit, and who, it would appear, did not make any such goods until

after defendant Dearnley entered his service, having been previously employed in the plaintiff's, and having become acquainted with the particulars of the plaintiff's manufacture. The plaintiff has, moreover, stated explicitly that he never heard or knew of the adoption by any person of the names he claims until shortly before the commencement of the present suit, and that as soon as he did know of it he took steps to prevent it; and no attempt has been made to dispute his statement in this respect; and however this may have been, none of the witnesses say that the commodities made by them were distinguished by tickets, or in any other manner, so that by any possibility the goods made by them could be mistaken for those in which the plaintiff was known to deal. But it is not by the names alone that the identity of the plaintiff's goods is preserved. For the purpose of preserving that identity he employs a ticket which is proved to be of an original design, in which is written by the plaintiff the name of the commodity, which is affixed to the goods themselves, and which is used as and meant to be the mark by which in his trade he announces the name and color and quality of his goods, and becomes responsible, as between himself and the persons with whom he deals, for the particulars inscribed on the ticket. The defendants use for the like purposes a ticket very closely resembling that of the plaintiff. The defendants say this *ticket was selected by the defendant [552 Dearnley from the stock of a stationer at Huddersfield, who says that he made the ticket for an Irish firm, which he does not name. The former employment of the defendant Dearnley in the plaintiff's manufactory suggests to the plaintiff and some of his witnesses that this selection could not be accidental. The defendant Dearnley says the nature of his employment by the plaintiff did not make him acquainted with the tickets then used, his department being the manufacture in a mill distant from the warehouse, and the tickets being affixed to the bales when finished, and in the latter place; and, not admitting that he had ever seen the plaintiff's tickets, he says that if he had ever done so he had wholly forgotten it at the time when he bought the tickets he uses. I do not lay any stress upon such contradiction as is given by the plaintiff's witnesses to this part of Mr. Dearnley's statement; but, taking it to be as he says, I cannot admit it as an excuse for the adoption by the defendants of a ticket so closely resembling that of the plaintiff which is used by them as well as by the plaintiffs as a trade-mark, and as the only trade-mark used by either of them.

The observations of the Lord Chancellor in *Wotherspoon v. Currie* (1) seem to have a very direct application to this part of

(1) Law Rep., 5 H. L., 508.

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the case. His Lordship, speaking of the similarity of the packets of starch made and sold by the defendant to those in use by the plaintiff, says ⁽²⁾:

“When there is so much general similarity, it does become the more necessary to take care that the mark which is to distinguish the article shall be really distinguishing, and that when you have got all the other combinations, so that persons do not look at the shape of the packet, or at any other *indicia* of the packet than the particular distinguishing mark (in this case the name of the man or the fancy name of the article), those things should, by people who wish to deal honestly by each other, be kept very distinct.”

The particular facts in the starch case, *Wotherspoon v. Currie* and in the present, are different, but the principle of the decision is the same, and must be applied to this case if the result leads to the conclusion which was drawn in that case, “that the public might be led to believe while they buy the defendant’s goods, that they are buying an article manufactured by plaintiff 553] in consequence *of a name (Glenfield) being used, the celebrity of which was first acquired by its being applied to plaintiff’s manufacture, which of course they think it continues to be.”

The plaintiff in that case had manufactured and sold starch. There was nothing in the nature of the manufacture which could give the plaintiff any exclusive right to such manufacture, but he had bestowed upon it a name by which he sought to distinguish the starch made by him from the starch made by other manufacturers, and by that name his commodity was sold and known. The defendant had adopted the same name, and had sold his starch made up in packets the external appearance of which resembled those used by the plaintiff; and although this fact is mentioned in the judgment, and observed upon as casting some doubt upon the good faith of the defendant, the principal ground of the decision I take to be that the use of the name “Glenfield” was the wrongful act from the continuance and repetition of which the defendant was restrained. And that this was so appears from the observations made by Lord Westbury on the same occasion, who said ⁽³⁾: ‘I take it to be clear, from the evidence, that, long antecedently to the operations of the defendants the word ‘Glenfield’ had acquired a secondary signification or meaning in connection with a particular manufacturer — in short it has become the trade denomination of the starch made by the plaintiff. It was wholly taken out of its ordinary meaning and in connection with starch had acquired that peculiar secondary meaning to which I have referred. The

⁽¹⁾ Law Rep., 5 H. L., 514.

⁽²⁾ Page, 521.

word "Glenfield," therefore, as a denomination of starch, had become the property of the plaintiff. It was his right and title in connection with starch." Then, is the use made by the defendants of the names of the plaintiff's cloths, and the form and manner in which the defendant's cloths are sold, likely to deceive purchasers, and to lead them in buying the defendant's cloths to suppose that they are buying those of the plaintiff? I have referred to the evidence on this point, but even without that evidence I think it is apparent that such must be the result. It is not possible that the merchants who deal wholesale with the defendants can be misled. They purchase directly from the defendants, and know what they are doing. But the tailor or other retail dealer *who, having become acquainted with [554 the name and quality of the plaintiff's cloths, and desiring further supplies of the same and no other—if he goes to the merchant and asks for what he wants by the only name he knows of, and sees lying before him two bales of cloth, similar in all external appearance, with tickets attached to them (if the merchant had suffered such tickets to remain attached, which seems not always to be the case) so nearly alike that the difference could only be perceived upon a very minute examination, and not possessing such skill and experience as would enable him to detect any difference in the quality of the goods by merely looking at them, would unquestionably be liable to be disappointed and deceived. The temptation of the lower price would not unnaturally induce him to select the defendants' cloths, which are, I think, upon the evidence as it now stands, shown to be of quality inferior to the plaintiff's and thus the retail dealer would find himself possessed of cloth in the manufacture of which Mungo had been used, while he thought he was acquiring the cloth of the plaintiff, which is composed of wool only. The wear of the article might ultimately convince him of the mistake he had made; but in the meantime the plaintiff's reputation and his trade would be damaged.

I am, therefore, of opinion, that the plaintiff has established such a right to the exclusive use of the names by which, and the tickets with which, he has for years past sold his goods; that the defendants cannot be permitted further to use those names or tickets so closely resembling those of the plaintiff. It has been said on the part of defendants, that it would not be right to grant an interlocutory injunction, because the consequence of that would be to stop, or at any rate to interfere prejudicially with, their trade. If the injunction is the right of the plaintiff, I do not think it ought to be withheld from him upon any such consideration. But I am far from thinking that it would necessarily have any such effect as the defendants suggest. Their

trade need not be in any degree intercepted, although they are debarred from using the name and tickets in question, while, on the other hand, the prejudice to plaintiff might be very great if the defendants are permitted to sell at lower prices goods of inferior quality, but of the same name and externally resembling 555] those of the plaintiff, by which he has *established an extensive trade and reputation. I think, therefore, that the injunction as prayed for must issue.

Solicitors : Messrs. *Learoyd & Learoyd* ; Messrs *Van Soudan & Cumming* ; Messrs. *Edwards, Layton, & Jacques*.

5. *Held* (reversing the decision of the Admiralty Court), that the collision was the result of the negligence of the defendant, the defendant was liable for the damage done all that could be required of the defendant, namely care, caution, and the short space of time between the collision and that the plaintiff was obliged to rely upon the facts stated in the sheets had not been brought back, ought to have been taken into consideration in their petition and the collision; the allegation that the defendant's report not sufficient to support the claim, the nature of such omission.
6. It is a rule in the Admiralty Court in cases where a collision has occurred, to be the result of inquiry, to make no order as to the amount of damages it can be shown that the defendant has brought unreasonable and sufficient *prima facie* evidence to support the rule followed by the defendant in the case of *The Marpesia*.
7. The authority of the Admiralty Court to sell the goods of the owner is derived from the fact that the owner of the situation is placed; and, consequently his selling, he is not a necessity for the

bility to communicate with the owner. Under these conditions, and by force of them, the master becomes the agent of the owner not only with the power, but under the obligation (within certain limits) of acting for him; but he is not, in any case, entitled to substitute his own judgment for the will of the owner, in selling the goods, where it is possible to communicate with the owner.

8. The possibility of communicating with the owner depends on the circumstances of each case, involving the consideration of the facts which create the urgency for an early sale, the distance of the port from the owner, the means of communication which may exist, and the general position of the master in the particular emergency.

9. Such a communication need only be made when an answer can be obtained, or there is a reasonable expectation that it can be obtained, before the sale. Where, however, there is ground for such an expectation, every endeavor, so far as the position in which he is placed will allow, should be made by the master to obtain the owner's instructions. *Australasian Steam Navigation Co. v. Morse*. 100

10. A charterparty provided that the ship should load a full and complete cargo of sugar in bags, hemp and compressed bales, and [or] measurement goods. It likewise specified different rates of freight for dry and wet sugar. The ship proceeded to her port of loading, where a cargo of wet sugar was provided for her by the charterer. A great deal of moisture drains from the wet sugar, and when the cargo had been nearly all shipped it was found that there was such an accumulation of molasses in the hold, the result of drainage from the sugar, that the ship would not be seaworthy for the voyage if she proceeded in her then condition. Owing to the nature of the material and the depth of the hold, the ship's pumps were unable to clear the ship of the drainage from the sugar. The ship was perfectly seaworthy except with respect to this particular cargo, and the pumps were quite sufficient for all ordinary purposes. The sugar had to be unloaded again, and the charterer then refused to reload it or to provide any other

cargo. Cross actions were brought—the one by the shipowner against the charterer for refusing to provide a cargo, and the other by the charterer against the shipowner to recover damages by reason of the ship not being fit to carry the cargo provided for her.

11. At the trial the jury, in answer to questions left to them by the judge, found that the cargo of sugar which was offered was a reasonable cargo to be offered; that the ship was not reasonably fit to carry a reasonable cargo of wet sugar; that the ship could not have been made fit within such a time as would not have frustrated the object of the adventure; and that the ship would not, without new pumps, and with a reasonable cargo of wet sugar on board, have been seaworthy:

12. *Held*, that the shipowner, by entering into the charterparty, undertook that the ship should be reasonably fit for the carriage of a reasonable cargo of any of the kinds of goods specified in the charterparty, and consequently of a reasonable cargo of wet sugar; and that upon the finding of the jury that she was not so fit, and could not be made so in such a time as not to frustrate the object of the voyage, the charterer was entitled to succeed in both actions. *Stanton v. Richardson*. 314

13. In an action by a shipowner against the charterers for not loading a cargo of coals pursuant to a charterparty by the terms of which the owner engaged that the vessel, then in the port of Sunderland, being tight, &c., should with all possible dispatch proceed direct to the South Dock, Sunderland, and there load, in the usual and customary manner, at any one of the collieries the freighters might name, a full cargo of coals, &c., which the freighters bound themselves to ship by a given day, for Calcutta, the defendants pleaded that they had not any notice of the ship having proceeded to and having arrived at the South Dock, and of her being ready to receive cargo, wherefore they did not nor could load:

Held, that the allegation in the plea must be treated as an allegation of fact, meaning that by reason of want of notice of the ship's arrival at the dock and being ready to load, the de-

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endants were prevented loading her ;
and that so read the plea was an an-
swer to the action. *Stanton v. Aus-*
tin. 417

14. By the improper navigation of a steam tug B., a vessel at anchor was sent adrift and placed in jeopardy. A steam tug, W., rendered assistance to the drifting vessel:

Held, that the owners of the *W.* were entitled to recover salvage reward for the services rendered, notwithstanding that some of them were also owners of the vessel which occasioned the mischief. *The Glengaber*.

15. A ship fell in, on the high seas, in the winter season, with a brig in distress for want of sufficient hands to work her. The master of the ship sent two of his crew, who had volunteered to go on board the brig, and by their assistance the brig was navigated safely into a British port. In consequence of the absence of the two men, the ship was exposed to risk, and the remainder of her crew had to undergo extra labor :

Held, that not only the two men who went on board the brig, but the master and owners of the ship and the rest of the crew of the ship, were entitled to salvage reward for the services rendered. *The Charles*. 48'

6. In 1867 an English vessel, then at Monte Video, was chartered by W., to proceed with cargo to certain ports in South America. She took in the agreed cargo, and sailed according to orders, first to one and then to another of the ports of discharge named in the charter. A portion of the cargo was delivered, but the master failing to obtain any directions for the discharge of the residue, after considerable delay and after notice to the consignee, sold it to defray expenses. The vessel after having been several other voyages, arrived at Buenos Ayres in 1868, and procured a charter to an English port. After this last mentioned charter had been entered into, W. instituted legal proceedings at Buenos Ayres to recover damages for the non-delivery of the cargo shipped by him, and caused the vessel to be arrested for the damages so claimed. The arrest was under process valid according to the law in force at Buenos Ayres. By the advice

of the British co
the master agre
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claimed by him.
and the vessel w

In a suit instituted by the United States against the vessel and her partner, the court ordered the vessel after her seizure to enforce the bond.

Held, that the
which the bond
it incapable of b
Charles.

See AGREEMENT
BOTTOMRY

ADVANCING THE FRONTIERS OF KNOWLEDGE

See LEGISLATION
WITNESS

AFFIRM

See VENDOR AND

AG

See ADMIRALTY, 10
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note, 434.
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AGREE

1. Action for damage
ance of a contract
tain spars and tim
ered free of charg
soon as they can
hands of the guar
chasers not bound
delivered in one
like." No delivery
within the time s
of the guardian in
spars insisting on
consequence of a
issued in an action
the ostensible own
timber, whose mar
been served on him
that he was releas

proceedings and might have legally given them up:

Held, that not having done so, the parties contracting for the sale of the spars and timber were relieved from the damages awarded by the Court below for the non delivery thereof, on the ground that the reasonable construction of the words getting "out of the hands of the guardian," was the actual, and not constructive or legal title to the possession, which could alone insure the delivery:

2. *Held*, also that an action *en garantie*, founded on the former right of action, against the guardian as *garant*, by the original contractors for damages for wrongful detention of the spars and timber, could not, under the circumstances, be sustained; and the judgment made in such an action, awarding damages, reversed. *McLaren v. Murphy*. 134

3. C, a merchant domiciled at Alexandria, being indebted to the appellants, merchants carrying on business at Leipsic, for the purpose of settling litigation between them deposited with the respondent (an English merchant resident at Alexandria) certain bills drawn in his favor as security for the appellants' debt; the respondent by the agreement between C and the appellants constituting himself a voluntary deposittee of them, and undertaking to be responsible for them to the appellants "until the effective encashment of them, which remains intrusted to C:"

Held, that the respondent was not guilty of a breach of duty under this agreement in allowing C to take the bills when due, for encashment at his discretion, and was not bound to see that C handed over the money to the appellants. *Treffitz v. Canelli*. 146

4. Goods were shipped by plaintiffs on board defendants' vessel, under a bill of lading, "shipped on board the steamship Hibernia . . . from Singapore to London . . . with liberty to call at any ports, in or out of the route, to receive and discharge coals. . . &c., and to tranship the goods by any other steamer:"

Held, that the contract of the defendants was that the goods should be carried on board a ship in which the principal motive power during

the voyage should be steam. *Fraser v. Maintenance Telegraph, etc. Co.* 203

5. The defendant contracted for the purchase of a large quantity of Danubian maize "fair average quality of the season and port of shipment when shipped. To be shipped from Danube, &c., by three or more first class vessels. For shipment in June and [or] July, 1869 (old style), seller's option," &c.

In fulfilment of the contract on the part of the seller two cargoes of maize were tendered to the defendant, the bills of lading for which were dated respectively the 4th and 6th of June, 1869. The loading of these two cargoes was commenced respectively on the 12th and 16th of May, and completed on the 4th and 6th of June; somewhat more than the half of each cargo having been put on board in May. There was evidence that grain shipped in May was more likely to damage by heating than grain shipped in June.

It was left to the jury to say whether in their opinion the cargoes in question were "June shipments" in the ordinary business sense of the term; and they found that they were. The judge was of the same opinion, and directed a verdict for the plaintiff:

Held, in the Exchequer Chamber, by Martin, B., Blackburn, Mellor, and Lush, J.J., Kelly, C.B., dubitante, affirming the judgment of the Court of Common Pleas, that the conclusion was right.

6. *Held*, also, by Martin B., and Lush, J., Kelly, C.B., and Blackburn, J., dubitantibus, that the question was one for the jury. *Alexander v. Vanderzee* 379

7. A contract is complete when a letter has been posted accepting an offer which can be accepted by letter so sent.

8. A letter of application for shares in a company was put into the post, and was duly received by the directors. A committee appointed by the directors allotted 100 shares to the applicant, and the secretary of the company put into the post a letter addressed to the applicant informing him that the shares had been allotted to him, and that 10 per cent interest would be charged on the balance due in respect

of the shares. The letter was duly received by the applicant, but before he received it he had sent by post a letter declining to accept any shares.

Held, That the contract was completed when the letter announcing the allotment of the shares was put into the post.

9. *Held*, that under the articles of association of the company, the allotment of shares by a committee instead of by the whole board of directors, was valid:

Held, that the provision for payment of interest on the balance was not a new term introduced into the contract. *Harris's Case*. 529

See, ADMIRALTY, 314, 417.
CONVEYANCE, 291.
INSURANCE MARINE, 208.
MINES, 281, 458.
SALES, 429.

ANIMALS.

1. If the owner of a dog appoints a servant to keep it, the servant's knowledge of the dog's ferocity is the knowledge of the master. *Baldwin v. Casella*. 434

ANNUITY.

See WILL, 684.

APPURTENANT.

See CONVEYANCE, 291

ARBITRATION.

1. The defendant, as broker, made a contract for the plaintiff, the seller, as follows: "Oct. 26, 1869. Sold by order and for account of Mr. D. P., to my principals, Messrs. S. H. & Son, to arrive, 500 tons Black Smyrna raisins—1869, growth—fair average quality in opinion of selling broker—To be delivered here in London a 22s. per cwt.—D. pd.—Shipment November or December, 1869," &c.:

Held, by the Exchequer Chamber—affirming the judgment of the Court of Common Pleas—that the defendant was employed as a sort of arbitrator to determine between the parties any difference which might

arise as to the tendered in fulfilment and consequently liable to an action on the contract. *Pappa*

ASS

See PAR

ASSIG

1. B consigned to ship *Acacia* a cargo purchased at the and the defendant of the particular had drawn again to his own order. B. indorsed to the these bills, which order of myself 1 sterling, which per A." B. having the defendants re bills; but after offered to pay to the plus of the proceeds a balance due to the general account of the plaintiffs refused to file their bill, claiming full amount of the *Held* (affirming master of the rolls) had no lien on the cargo. *Robey and Ollier*.

2. When covenant is broken.

ATTACH

See LEX LA

ATTOR

1. A solicitor is entitled to his costs on property in a successful suit against an incumbent the incumbency be less, provided it forms the title.

2. It is no objection to an application for such a charge that it is made in a suit which is no longer pending, and which was never brought to a hearing, nor that the property has been sold before the application of the solicitor.
3. *Semble*, a married woman is bound by estoppel by a recital in a deed duly executed and acknowledged by her, in the same manner as if she were a *feme sole*.
Order of the Master of the Rolls affirmed. *Jones v. Frost*. 622, 625 *note*.
4. When has a lien and when protected from settlement. 625 *note*.
5. When compelled to produce papers. 625 *note*.

See BANKRUPTCY, 228.

AUCTIONEER.

See TROVER, 232, 254 *note*.
VENDOR AND PURCHASER, 674.

B.

BAILMENT.

1. Certain cases of wine were ordered by L. of the plaintiff, and were shipped by the plaintiff consigned to L., who deposited the bill of lading with the defendant, a wharfinger, with directions to take delivery and warehouse the wine on L.'s account. The wine, on its arrival, was entered at defendant's wharf in L.'s name, subject to a stop for the freight. L. afterwards refused to accept the wine on the ground that it was not according to contract; the plaintiff agreed to take it back, and L. promised to send a delivery order to enable the plaintiff to obtain it; but on the same day L. indorsed the bill of lading to M., which M. took to the defendant's wharf and procured a transfer of the wine into his own name. The plaintiff was afterwards informed by L. that the wine was at the disposal of the plaintiff, but subject to charges amounting to 17*l.* 14*s.* 9*d.*, and 5*d.* for loss of profit. At an interview be-

tween M. and the plaintiff M. offered to give up the wine on payment of the above sums. The plaintiff tendered the former sum which M. would not accept. The plaintiff's attorney afterwards offered to the defendant to pay all charges, and to indemnify him against the claim of any other person. The defendant refused to deliver the wine to the plaintiff, alleging that he had given warrants to M. The wine was ultimately delivered to a third person by M.'s order. M. had in fact paid the freight, and obtained warrants to him or his order. The jury found that the transaction between M. and L. was colorable and with knowledge on the part of M. of the intention of L., to deprive the plaintiff of the wine:

Held, power having been reserved to the Court to draw inferences of fact, that the defendant received the wine as bailee to L., and after the payment of the freight could have no better title than his bailor; that by the finding of the jury M. had no better title than L.; and, as the plaintiff had tendered the amount of charges both to M. and the defendant, the plaintiff's title was as valid against the defendant as it would have been against L.; and that the defendant was liable to the plaintiff for the value of the wine. *Batut v. Harth y.* 214

See AGREEMENT, 146.
TROVER, 232, 254 *note*.

BANKRUPTCY.

1. Declaration against defendants for a breach of duty as attorneys in not getting the best price for the equity of redemption in premises of plaintiff intrusted to defendants for sale. The defendants well knew that if plaintiff did not obtain a reasonable price, the bankruptcy of plaintiff would be the necessary and inevitable consequence and that in consequence of defendants' breach of duty plaintiff was adjudged a bankrupt. Plea: the bankruptcy of plaintiff under the Act of 1869, and that the causes of action passed to the assignee. On demurrer:
Held, by Blackburn, Mellor, and Lush, J.J., on the authority of *Hodgson v. Sidney* (Law Rep., 1 Ex., 312), that bankruptcy was a good defence, and that the averment that defendants

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knew that bankruptcy would ensue made no difference. *Hannen, J.*, doubting whether *Hodgson v. Sidney* was not distinguishable on that ground. *Morgan v. Steble.* 228

BILL OF LADING.

See AGREEMENT, 203.
ASSIGNMENT, 571.
BAILMENT, 214.

BOTTOMRY.

1. A bottomry bond on a ship and freight was given by the master for repairs of the ship (already subject to a mortgage), with an agreement by the bondholder, the ship's agent, that if a bill of exchange, drawn by the master upon the mortgagee, should be duly honored, the bond should not be enforced. The drawee died before the bill was presented, and neither administration nor probate of his will had been taken out, when the holder of the bill, in ignorance of the death of the drawee, presented the bill for acceptance:

Held, that it was not necessary, in order to entitle the bondholder to enforce the bottomry bond, that there should have been such a dishonor of the bill as might have been necessary to give a right of action against a drawee or indorsee of the bill, and it was sufficient that what was the reasonable course, for the purpose of getting the bill accepted and paid, should have been taken, which, having regard to the circumstances of the case, appeared to the judicial committee to be established; and the bond held good.

2. The bond on the ship and freight was made absolute on the arrival of the ship at Callao, but the bond also hypothecated the freight to be earned by the ship from that place to any other port or ports:

Held, that the bond was good *pro tanto* as to the ship, but void with respect to the subsequent freight earned in the voyage from Callao to England. *Smith v. Bank New South Wales.* 74

See ADMIRALTY, 490.

BR

1. The plaintiff, broker, contractor, a jobber on for the sale of pany. On the 1 ant gave in to t a ticket with tl intended purcha passed to him by transfer to L. v cuted by the p afterwards disco infant, and the registered. In a against the defe nity against calls
Held (reversin Bacon, V.C.), tha having given th feree who was c the transfer, was liability, although ed by the rules of for objecting to a had expired befo the transfer:

2. In sales of share change the ultim between the vend purchaser's broke vendor and the on the ticket, wh gether by means therefore, until a who is capable o who has given au of his name, the charged from liabi
Merry v. Nickalls.

BUILD

See NEGLIGENCE,

C.

CARRI

1. The plaintiffs, wh contract to supply a tary shoes to H. in use of the French pair, an unusually hi livered there by the 1871, sent the shoes t station at K. in tim

in the usual course in the evening of that day, when they would have been accepted and paid for by the consignee; and the station master had notice (which for the purpose of the case was assumed to be notice to the company) at the time that the plaintiffs were under a contract to deliver the shoes by the 3d, and that unless they were so delivered they would be thrown on their hands, but no notice was given to the defendants that the contract with H. was owing to very exceptional circumstances, not an ordinary contract.

The shoes not arriving in London until the 4th, H. rejected them, and the plaintiffs were ultimately obliged to sell them at a loss of 1s 3d. per pair, 2s. 9d. per pair being the ordinary market value.

In an action against the defendants for their breach of contract, they paid into Court a sufficient sum to cover any ordinary loss occasioned by the delayed delivery; but the plaintiffs further claimed 267l. 3s. 9d., the difference between the price at which they had contracted to sell the shoes to H. and the price which they ultimately fetched.

Held, that they were not entitled to recover the latter sum, the damage not being the natural consequences of the defendants' failure to perform their contract, and the defendants not having had notice that the sale to H. was at an exceptional price. *Horne v. Midway Railway Co.* : 90

See MASTER AND SERVANT; 308, 313
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COMITY.

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COMPROMISE.

1. Where, by resolutions under the Bankruptcy Act, 1869, the creditors agreed to accept a composition payable by installments, and the debtor made default in payment of an installment to a creditor :

Held (reversing the decision of the register), that the creditor could maintain an action against the debtor for the balance of the whole debt remaining unpaid, and would not be restrained by the Court of Bankruptcy. *In re Hutton.* 594

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CONSTRUCTION.

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CONVEYANCE, 291.

MINES, 281.

WILL, 44.

WORDS.

CONT

See **Trove**

CONV.

1. The plaintiff, Chase two adjoin sell one to P., at tion that house (and by him to description being house now in th The houses were built up to the foot front of defendant which adjoined t slight projection i middle of this wa and a half feet w of the doorway wa a shallow portico was a window of t above that a pedic cally placed on t tion. Inside the the two houses, i cident with the e feet projection, v with one side of t if the party wall in a straight lin feet eleven inches projection, which portico and of th whole of one of th the portico, wou plaintiff's side of t inside, these two which from the be part of defend part of the wall plaintiff's house. ing painted the t and the whole of were stucco, plat ion of trespass, one pillar, the pa the part of the pe On the above fac power to draw i
- Held* (by Bla J.J.): Lush, J., disputed parts b iff, and did not pa in the occupatio

COPY

1. There is no copy advertisement,

wise of articles which any one may sell.

2. Where an upholsterer, who had published an illustrated furnishing guide with engravings of the articles of furniture, which he sold, and descriptive remarks thereon, filed a bill to restrain the defendant, another upholsterer, from publishing, for the purposes of his own trade, a similar work in which many of the said engravings and portions of the letterpress of the first work were alleged to be copied :

Held, that the defendant could not be restrained by injunction from so copying the plaintiff's illustrations or such part of his work as was not original but merely descriptive of his stock or of common articles of furniture ; but that, the defendant's work being a flagrant imitation of the plaintiff's, he could be allowed no costs. *Cobbett v. Woodward.* 795

3. The plaintiff, the publisher of a work which he claimed to have originated, called *The Birthday Scripture Text Book*, consisting of a printed diary interleaved, with a blank space opposite each day with a text of Scripture appended, and which was designed as a record of the birthdays of friends :

Held, entitled to an injunction to restrain the defendants from publishing and selling a work subsequent to the plaintiff's, called *The Children's Birthday Text Book*, on the ground that it was an infringement of the plaintiff's copy right in the title of his work, as well as a colorable imitation of the same. *Mack v. Petter.* 809

CORPORATION.

See DIRECTORS, 1, 28 *note*, 625, 754.
SPECIFIC PERFORMANCE, 509.

COSTS.

See ADMIRALTY, 92.

CREDITOR.

See COMPROMISE, 594.
FRAUD, 659, 695, 701.
SURETY, 298, 307, *note*.

CROSS REMAINDERS.

See ESTATES TAIL,
WILL, 559.

D.

DAMAGES.

1. What are consequential and not recoverable, 890.

See BANKRUPTCY, 228.
CARRIER, 390.
SALE, 429.

DEBTOR.

See COMPROMISE, 594.
FRAUD, 695, 701.

DEEDS.

See CONVEYANCE, 201.

DEVISE.

1. When divested, 557.
See WILL, 814.

DIRECTORS.

1. Facts which may show imprudence in the exercise of powers undoubtedly conferred upon directors will not subject them to personal responsibility; the imprudence must be so great and manifest as to amount to *crassa negligentia*.
2. Where the directors to whom these powers were intrusted, and who exercised them, were, by the "Company" which had conferred the powers, afterwards sought to be made responsible for their exercise :— *Held*, that malfeasance or *crassa negligentia* ought to have been distinctly charged.
3. The bill being defective in that respect :— *Held*, that it could not be sustained.
4. In a company formed for the purchase of a business where the power to make the purchase was distinctly conferred on the directors, though the character

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- of the business turned out to be ruinous, unless that character was obviously apparent when the purchase was made, the directors will not be personally responsible for making it.
5. In this case a prospectus was, in the usual manner, issued by the directors, but that prospectus in no way whatever affected the claim of the plaintiff company to compensation for loss consequent on the purchase of the business, for the company was formed for the express purpose of purchasing the business, and was not induced to take that step by any previously issued prospectus.
 6. An agent (and the directors here were rather agents or mandatories than trustees) being authorized to do an act in itself imprudent, and one which the principal ought not, as a matter of prudence, to have authorized, is not to be held responsible for the consequences of doing it. *Overend & Gurney Co. v. Gibb*, 1, 28 note.
 7. Three directors of a railway company opened, on behalf of the company, an account with a bank, and sent a letter signed by the three as directors, requesting the bank to honor checks signed by two of the directors and countersigned by the secretary. The account having been largely overdrawn by means of such checks, the bank sued the company at law, recovered judgment in 1865, and issued an *ex parte* order. The proceeds being insufficient to satisfy the debt, the bank filed a bill to make the directors personally liable: *Held* (reversing the decision of *Bacon, V.C.*), that the letter did not make the directors personally responsible for the debt, for that, assuming the letter to contain a representation that the directors had power to overdraw the account, and such representation to be erroneous, this was not a misrepresentation of fact which the persons making it were bound to make good, but only a mistaken representation of the law; and, moreover, that even if it had been such a false representation as the directors were bound to make good, the bank would have had no claim against them, since it had been able to enforce the same remedies against the company as if the representation had been true.
 8. *Scmble*, that the letter did not involve any representation that the directors had any other powers of direction.
 9. In 1864 a negotiation between the company and the bank, the bank's secretary of the company, directed to apply for at least £20,000 of preference shares in the company, and J. A. myself and J. A. bank as collateral security. In the company having of the preference shares, I wrote, "I am not prepared to accept your letter in your collateral security, as the court in such cases, to the names of two of the company, who prefer of them to you mutual undertakes to be held by you security for the debt. The manager is prepared to accept your disposal of shares were according to the directors, them to the bank, and debentures given by the directors, which I preferred. Nothing shares, and the company in a position legal debentures." *Held* (reversing *con. V.C.*), that the directors did not make the company liable, and that, of the correspondence had not made any the shares and debentures, but the nature was only that the directors should be in control of the bank, and were taken up

money paid for them must come to the hands of the bank. *Beattie v. Lord Ebury*. 625

10. It is not a mere canon of English municipal law, but a great and broad principle, which must be taken (in the absence of proof to the contrary) as part of any given system of jurisprudence, that the governing body of a corporation which is a trading partnership—that is to say, the ultimate authority within the society itself—cannot, in general, use the funds of the community for any purpose other than those for which they were contributed. Therefore the special powers given to such ultimate authority—whether it be the directors, or a general council, or a majority at a general meeting, by the statutes or other constituent documents of the association (however absolute in terms)—are always to be construed as subject to a paramount and inherent restriction that they are to be exercised in subjection to the special purposes of the original bond of association.

11. English directors of a foreign railway company, which was subject to Turkish law (as to which there was no evidence before the Court), were restrained from applying the funds of the company in the further payment of the costs of a prosecution for libel brought by them against a person who had acted as secretary to a committee of the company; but were not, under the circumstances of the case, ordered to repay the amount of certain of the costs already so satisfied by them. *Pickering v. Stephenson*. 754

DISCRETION.

See DIRECTORS, 1, 28 note.

DIVORCE.

1. A wife having charged her husband with cruelty by the communication of disease, and also by personal violence, the Court found, on the evidence, that the charge of communication of disease was not proved, and that the charge of personal violence was proved. On the application of the husband, a rule for the rehearing of the issue which had been found against him was made absolute, on the ground of surprise;

but the rehearing was ordered to be confined to the charge of personal violence, and not to extend to the charge of infection. *Lee v. Lee*, 484.

See MARRIED WOMAN, 801.

E.

EJECTMENT.

1. The service of a notice to quit made at the house of the tenant upon a person whose duty it would be to deliver the notice to the tenant, is sufficient to sustain ejectment, although in fact the notice was never delivered to the tenant.

The presumption in such cases is that it did reach the tenant himself.

In such a case the question is not whether the servant performed his duty in delivering it to his master, but whether the servant was to be considered as the agent of the master to receive the notice. If he was, the service of the notice will effectually bind the master.

Per THE LORD CHANCELLOR (Lord Hatherley):—The fact that the agent who received the notice destroyed it would liberate entirely the person who delivered the notice, but would not liberate the person whose agent had received and destroyed it.

Per LORD WESTBURY:—Where there has been service of a notice to quit left at the tenant's house with a servant of the tenant, such a fact is more than presumptive evidence of a service on the tenant. The landlord's right would otherwise be controlled by something to which the landlord was an utter stranger.

Per LORD WESTBURY:—But even if only presumptive evidence of the service, the evidence to rebut it must be proof of the fact that the notice did not come to the knowledge of the tenant at all.

2. T lived in a house where his two sons and his daughter also resided. T was imbecile. The house was managed by his daughter, the farming business by his two sons. A notice to quit, addressed to the father, was served at the house by delivery to the daughter. She put it on the dresser in the kitchen, and afterwards burnt

it. One of the sons knew of its existence, but was not shown to have known its exact terms, though he was aware of its nature:

Held, that this was a service sufficient to entitle the landlord to maintain ejectment against the father. *Tanham v. Nicholson*, 154

EQUITY

See INSURANCE, LIFE, 824.
SPECIFIC PERFORMANCE, 509

ESTATE TAIL.

See WILL, 44, 486, 690, 704, 748, 814.

ESTOPPEL.

See EXECUTORS AND ADMINISTRATORS, 811, 820.
FORMER SUIT, 380, 390 *note*.
SPECIFIC PERFORMANCE, 654.

EVIDENCE.

See LIBEL, 194.

EXECUTORS AND ADMINISTRATORS.

1. A bill by a creditor to administer the estate of a testator alleged that the testator by his will gave to his wife, the defendant, the use for her life of half his estate, and appointed her guardian of his children; that administration with the will annexed had been granted to the defendant, who was "the only legal personal representative and also heir of the undisposed of moveables and immoveables," and that she had received and entered into possession of all the real and personal estate of the deceased:

Plea, that the defendant was not, nor had ever been, administratrix with will annexed or legal personal representative of the deceased.

Held, that if the defendant was not administratrix, she was executrix *de son tort*, and the bill could be sustained. *Plea* ordered to stand for an answer, with liberty to except. *Rayner v. Kochler*. 733

3 ENG. REP.] 108.

2. A power of sale given by a testator to his executors or administrators may be exercised by an administrator *durante minore etate*. *Monsell v. Armstrong*. 808

3. In a creditors' suit for administration of the real and personal estate of a testator, a judgment recovered against the executors (who were also trustees of the real estate) *held* to be *prima facie* evidence of a debt as against the persons interested in the real estate; but they were to be at liberty to adduce rebutting evidence. *Harvey v. Wilde*. 811

4. Earls A. B. and C. being successive tenants in tail of property held under an inalienable Parliamentary title, and B having, after the death of A, entered into possession of the entailed estates, and, together with them, of certain leaseholds formerly in the possession of A, the executors of A, brought an action of ejectment against B, to recover possession of the leaseholds as part of A's estate. B, having died before trial of the action, another action was brought against C, the successor in title. C who was also executor of B. compromised the action on terms of giving judgment and buying the leaseholds at a certain price, with a further stipulation that £4000 should be allowed as a debt from B's estate in respect of rents received by B. Before the compromise a creditor's suit was instituted and a decree made for the administration of B's estate which was insolvent. On a summons by A's executor to prove against B's estate for the amount of rents actually received by him:

Held, that the judgment given in the action against C was not evidence of wrongful possession by B, which could serve as a foundation for the claim, and that the admission by the executor as to moneys profits in the compromise was inoperative, being made after the decree. *Talbot v Earl of Shrewsbury*. 820

5. When personally liable. 744, 747 *note*.

See GIFT, 715, 718.

EXTINGUISHMENT.

See FORMER SUIT, 383, 390, *note*.

FOREIGN GOVERNMENT.

See LEX LOCI, 499.

FORMER SUIT.

1. A judgment in an action against one of several joint tortfeasors is a bar to an action against the others for the same cause, although such judgment remains unsatisfied. *Brinsmead v. Harrison*, 383, 890 note.

See EXECUTORS AND ADMINISTRATORS
811, 820 note.
INSURANCE, LIFE, 824.

FRAUD.

1. Where a father was, by his marriage settlement, empowered to divide at discretion the funds in which the children had an expectant interest:

Held, that he could not deal or negotiate with them in executing the power.

Per THE LORD CHANCELLOR: A parent in such a case purchasing the interests of the children, one of them being only eighteen years of age, is a transaction wholly inconsistent with that protection which the law of every civilized country affords to children; and would not be permitted without the fullest evidence of an intention authorizing it.

2. *Held*, reversing the decree below, that releases or discharges granted by the children to the father, in consideration of money payments made by him, formed no bar to their subsequent claims under the settlement,—such releases or discharges notwithstanding.

3. A Power may be executed without any Express Reference to it.

Per LORD CHELMSFORD: The donee of a power may execute it without referring to it, and without taking the slightest notice of it, provided the intention to execute the power really appears.

Appointments pro tanto.

The power may be exercised from time to time by several appointments, to suit convenience and promote advantage, as exigencies arise, or as expediency may suggest.

Per LORD WESTBURY: Some of the learned judges of the Court below seem to have thought that the power required an execution *uno flatu*, once for all. If that were so, no appointment to a child, though settled in life, could take place until all the other children, objects of the power, had attained maturity.

Special Judgment.

Per LORD WESTBURY: I am desirous that we should dispose of this case, so as not to leave any door ajar that may be pushed open for further litigation. *Cunninghame v. Anstruther*. 169, 186, note.

4. A voluntary settlement whereby the settler takes the bulk of his property out of the reach of his creditors, shortly before engaging in trade of a hazardous character, may be set aside in a suit on behalf of creditors who became such after the settlement, though there are no creditors whose debts arise before the date of the settlement, and though when the settlement was made it was doubtful whether the arrangements under which the settler was to engage in the business would take effect.
5. Where a voluntary settlement is made on the eve of the settler engaging in trade the burden rests upon him of showing that he was in a position to make it.
6. In order to set aside a voluntary settlement as being void as against creditors, it is not necessary to show that the settler contemplated becoming actually indebted. It is sufficient if he contemplated a state of things which might result in bankruptcy or insolvency.
7. A debtor is not entitled to set up, as a defence to a suit to set aside a voluntary settlement, a release contained in an inspectorship deed by which he vested all his property in the inspectors, the settlement or the existence of the property comprised in it not having been disclosed at the time the inspectorship deed was executed. *Mackay v. Douglas*. 659
8. A distribution by a debtor, when in a weak state of mind and body, of the whole of his property among his children, partly in consideration of annuities for his life, partly by voluntary settlement, and partly by pecuniary gifts.

Held void as against creditors under the 18 Eliz. c. 5. the Court being satisfied, on the evidence, that the children were aware at the time that the creditor's claims would be defeated, though it did not appear that the debtor had any such intention. *Cornish v Clark*. 695

9. In the absence of actual intent to defeat, delay, or hinder creditors, a voluntary settlement, made by a settler in embarrassed circumstances, but having property not included in the settlement ample for payment of the debts owing by him at the time of making it, may be supported against creditors, although debts due at the date of the settlement may to a considerable amount remain unpaid. *Kent v. Riley*. 701

See DIRECTORS, 1, 28 *note*, 625
SETTLEMENT, 788.
SURETY, 259, 272 *note*.
TRADE MARK, 538.
VENDOR & PURCHASER, 674.
FREIGHT.
BOTTOMRY, 74.

G.

GIFT.

1. A wife being executrix of her father paid the moneys she received into a bank in her own name as such executrix. The husband, it was alleged, sometimes paid in money to this account, and the wife paid checks to her husband's creditors. The account remained for six years, when the husband died, and the wife died shortly afterwards:

Held, that if the money, or any part of it, belonged to the husband, he had shown an intention of making a gift of it to his wife, and it constituted part of her estate at the husband's death. *Lloyd v. Pughs*. 715, 718 *note*.

GUARDIAN.

See AGREEMENT, 184.

GUARANTY.

See SURETY, 259, 273 *note*.

H.

HEIRS.

1. When estopped by judgment against executor. 811, 820

HOTCHPOT.

See WILL, 563.

HUSBAND AND WIFE

See GIFT, 715, 718 *note*.
LEGACY, 772.
MARRIED WOMEN.
WILLS, 112, 184 *note*

I

INEVITABLE ACCIDENT.

See ADMIRALTY, 92

INFANT.

The court has jurisdiction to charge reversionary property of infants with money required for their maintenance, even where some of the infants for whose benefit the money is raised may not ultimately become entitled in possession to the property charged. A security for this purpose approved, with a provision for restoring the money by means of an insurance against the contingency. *Dewitt v. Palin*. 723, 725 *note*

See BROKER, 600, 621 *note*.
EXECUTORS AND ADMINISTRATORS, 803.
STOCKHOLDERS, 813.

INJUNCTION.

See COMPROMISE, 594.
COPYRIGHT, 795, 809.
MINES, 574.
TRADE MARK, 776, 833.
WASTE, 568.
WORDS, 574.

INSURANCE, LIFE.

1. A bill having been filed by an insurance company to cancel a life policy as obtained by misrepresentation, a motion was made to restrain an action upon the policy which was commenced immediately after the filing of the bill:

Held, that this Court had complete jurisdiction, but that the question would be more suitably tried before a jury; and motion refused accordingly. *Hoare v. Bremridge*. 824

INSURANCE, MARINE.

1. Defendants underwrote a policy of insurance for 1000*l*. declared to be upon cargo, being a re-insurance subject to all clauses and conditions of the original policy, in the ship *Daybreak*, at and from any port or ports in any order on the west coast of Africa to the vessel's port of discharge in the United Kingdom; the insurance "to commence from the loading of the goods at as above." By the original policy the insurance was for 1000*l*. upon the cargo valued at 3350*l*. of the vessel *Daybreak*, at and from Liverpool to any ports in any order backwards and forwards on the coast of Africa, and thence back to a port of discharge in the United Kingdom; with leave to increase the valuation of the cargo on the homeward voyage; outward cargo to be considered homeward interest twenty-four hours after her arrival at her first port of discharge. Goods, shipped at Liverpool, were lost by perils insured against more than twenty-four hours after the vessel had arrived at her first port of discharge on the coast of Africa:

Held, that the clause of the policy declared upon, that the insurance was to commence on the loading of the goods at as above, viz., a port on the coast of Africa, must be taken as qualified by the clause in the original policy, that outward cargo was to be considered homeward interest twenty-four hours after the ship's arrival at her first port of discharge; and that the policy had therefore attached. *Joyce v. Realm Insurance Co.* 208

2. The plaintiffs caused themselves to be insured with the defendants, "lost or not lost, in 500*l*., upon the freight payable to them in respect of this present

voyage to be performed by the vessel *Napier* from Baker's Island to a port of discharge in the United Kingdom, the insurance on the said freight beginning from the loading of the said vessel. Being a reinsurance to be paid as on original policy." The plaintiffs had underwritten a policy on chartered freight of a cargo of guano, from Baker's Island, while there, and thence to a port in England. The vessel arrived at Baker's Island, and had taken in two-thirds of her cargo, a full cargo being ready, when she was wrecked. The plaintiffs, having paid upon a total loss, sought to recover it from defendants:

Held, that the risk had not attached.

By Blackburn, J., on the ground that the clause, "the insurance on the said freight beginning from the loading of the said vessel," did not extend the insurance beyond the other part, "from Baker's Island," but only showed that defendants did not intend to be liable unless the goods were on board.

By Mellor and Lush, J.J., on the ground, that the latter words did extend the previous clause and made the risk begin earlier, but that "from the loading" meant from the completion of the loading. *Jones v. Neptune Marine Insurance Co.* 273

3. A cargo of rye was insured for 4160*l*. from Taganrog to Bremen. The policy contained the usual memorandum, "corn, &c., are warranted free from average unless general or the ship be stranded," &c., and in the margin were the following conditions,— "To pay general average as per foreign statement, if so made up. Warranted free from particular average unless the ship or craft be stranded, sunk, or burnt; but this warranty not to exonerate the underwriter from the liability to pay any special charges for mats, warehousing, forwarding, or otherwise, if incurred, as well as partial loss arising from transhipment. Warranted free from capture and seizure and the consequence of any attempt thereat."

After leaving Taganrog, the vessel encountered severe weather, and was compelled to put into several ports for repair, at each of which the captain, in order to enable him to obtain funds to put her in a condition to continue her voyage, gave a bottomry bond on ship, freight and cargo, the aggregate

of which with interest, on the arrival of the ship at Bremen, amounted to 2818*l.* 10*s.* 5*d.* The captain being unable to discharge this obligation, the consignees of the cargo, in order to obtain delivery thereof, paid the amount.

On the 3d of August, 1868, a statement was prepared by an average stater in Bremen, in which the loss arising upon the bottomry bonds was apportioned between the ship and freight and the cargo, as follows:—1088*l.* 14*s.* 11*d.* as falling upon the cargo, and 1185*l.* 11*s.* upon the ship and freight. The captain being unable to pay or give security for the 1185*l.* 11*s.* so charged upon ship and freight, the vessel was sold under an order of the tribunal of commerce at Bremen, and produced 729*l.* 10*s.* 2*d.* leaving a balance due to the holders of the bonds (the 1088*l.* 14*s.* 11*d.* having been paid) of 663*l.* 2*s.* 10*d.* On the 3d of October a "further or supplemental average statement" was made by the average stater, in which the last mentioned sum was stated as "the amount which the cargo had to pay as additional bottomry debt" to the holders of the bonds. These "average statements" were (upon a special case) admitted to be accurate, and correctly made up in accordance with the law in force in Bremen; and it was further admitted that "such a loss as that which occurred in this case is treated at Bremen as a general average loss and not as a particular average loss."

Held: that the underwriters were bound by the average statements so made, and consequently that the assured were entitled to recover the 663*l.* 2*s.* 10*d.* *Harris v. Scaramanga.*
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I

JOINT TENANCY.

See WILL, 436

JURISDICTION.

See LEX LOCI, 499

SPECIFIC PERFORMANCE, 509

L.

LACHES.

See AGREEMENT, 146
SETTLEMENT, 783
SURETY, 298, 307 note.

LANDLORD AND TENANT.

See LEASE, 872, 375 note.
NEGLIGENCE, 254, 259 note.

LAW.

See INSURANCE, LIFE.

LEASE

1. A and B, partners in trade, were assignees of a lease which contained a covenant by the lessee for himself and his assigns, that he would not, neither should his executors, administrators, or assigns, assign the demised premises without the consent in writing of the lessor. On the dissolution of the partnership, A assigned all his interest in the premises to B:
Held, a breach of the covenant.
Varley v. Coppard. 372, 375 note.

See MINES, 458.

LEGACY.

1. Where a previous decision, even of the Court of Appeal, is clearly based upon a misapprehension, the Court is not bound to follow it.
2. A testator after giving a pecuniary legacy devised his real estate to other persons than the legatee, not charging it with his debts. There being a deficiency of personal estate for payment of debts:
Held, that the real estate was not bound to contribute rateably with the legacy to meet the deficiency. *Dugdale v. Dugdale.* 710
3. A testator gave to three of his sons, Thomas, John, and Peter, legacies of £500 each, and to his daughter £200, and directed that neither of his sons to whom he should have advanced any sums of money in his lifetime should

be entitled to receive his said legacy of £500 without bringing such sums into hotchpot. The residue of his property he divided between his four sons, Charles, Thomas, John, and Peter, and his daughter. The testator had advanced to Charles, at different periods before the date of his will, £500, £170, and £58, and to Thomas, after the date of his will, £500 and £380.

Held, that the advances to Charles should not be taken into account against him, but that the £500 to Thomas was a satisfaction of his legacy, and the £380, being advanced after the date of the will, must be deducted from his share of the residue. *In re Peacock's Estate.* 711

4. T. stator gave, by will, the residue of his estate to trustees to pay and transfer the same unto seven legatees named, in equal shares as tenants in common, and their respective executors, administrators, and assigns, to whom he bequeathed the same accordingly; and he declared that such shares should be vested interests in each legatee immediately upon the execution thereof, and that the shares of the married women should be for their separate use:

Held, on demurrer, that the share of one of the legatees, a married woman, who died after the date of the will but before the testator, did not belong to her husband, her legal personal representative, but that it had lapsed. *Broune v. Hope.* 772

5. When divested. 557

See WILLS, 720, 814

LETTER.

See AGREEMENT, 529.

LEX LOCI.

1. Where a foreign government has made a contract in this country, and has lodged money in the hands of agents in this country for payment of the sums to become due under the contract, the Court will not refuse relief to the contractor because the contract was with a foreign government, nor because the foreign government does not appear before the Court.

2. Where goods are to be paid for when received, and money is lodged for payment on the production of certificates from an agent of the purchaser, the Court, if certificates are refused, may direct an inquiry and order payment of what is due to the contractor who has supplied the goods.

3. The French government contracted in England for the purchase of a large number of cartridges, which were to be inspected, and when accepted were to be paid for through the French ambassador; and bankers in England, who had in their hands funds belonging to the French government, wrote to the contractor in England that a special credit for £40,000 had been opened in his favor, and would be paid to him upon receipt of certificates from the French ambassador. Some cartridges were supplied and paid for, and others were delivered to agents for the French government; but other agents of the French government alleged that the time for the delivery had expired. Certificates were refused, and the bankers refused to make any further payments. The contractor thereupon filed his bill against the bankers and the French government, praying to have the balance of the £40,000 brought into Court, and for an inquiry and payment. The French government did not appear. The bankers were ordered to bring the money into Court; and the contractor was declared to be entitled to payment for all cartridges delivered under the contract; and inquiries what cartridges had been delivered were directed.

Decree of Malins, V.C., affirmed, with variations. *Lariviere v. Morgan.* 499

See WILLS, 475, 478.

LIBEL.

1. In an action of libel the defamatory words set out in the declaration must be proved as laid, and it is a fatal variance if the words as alleged are materially qualified by evidence of words not contained in the declaration, although such words as qualified are still libelous.
2. The defendant, after the publication of a libel and before the action was brought, destroyed the letter containing the libelous words:

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Held, that, as the defamatory writing was not in existence, secondary evidence of the contents of the letter by witnesses who heard it read was admissible, but that the actual words used as laid in the declaration must be proved, and not the substance or impression the witnesses received of the words, as otherwise the witnesses, and not the Court or jury, would be made the judges of what was a libel.
Ruiny v. Bravo. 194

2. The fair and honest discussion of or comments upon a matter of public interest is in point of law privileged, and is not the subject of an action, unless the plaintiff can establish malice.
4. The plaintiff, a naval architect, in 1867 submitted to the Admiralty proposals for the conversion of the old wooden line of battle ships of the navy into iron clad turret ships. His proposals were considered by the admiralty, and rejected. In September, 1870, the iron clad turret ship *Captain* whilst on a cruise capsized and sunk with all hands. This disaster caused great excitement and anxiety in the public mind; and with a view to explain the circumstances under which the *Captain* had been sent to sea, as well as the general course pursued by the Board with reference to the placing the navy in a proper condition to meet the exigencies of modern naval warfare, a minute was prepared by the first Lord of the Admiralty for presentation to parliament during the approaching session. This minute referred to and criticised the plans of conversion proposed by the plaintiff; and in a note was inserted a letter upon the subject addressed to the Board in September, 1867, by Sir Spencer Robinson, then controller of the navy, which letter contained this passage.—“These plans would have no weight whatever from the known antecedents of their author, but they derived weight from the approval of Mr. Watts, the late chief constructor of the navy.” and concluded by recommending their rejection. The minute was by order of the Lords of the Admiralty printed by the defendant, the Queen’s printer; and copies of it were publicly sold by him before the meeting of parliament.
4. At the trial of an action for this alleged libel, the judge assuming the

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L

See ASSIGNMENT
ATTORNEY,
VENDOR AND

LIFE

See W

LIMITATIONS

See W

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See INFANTS

MARINE IN

See INSURANCE

MARRIED

The plaintiff fil
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ment. Subsequently to the marriage sums amounting to £56,000 consols were settled by the wife's mother and relatives upon her life for her separate use, with remainder as to £300 a year for her husband for life, and subject thereto for the children. From 1862, she allowed her husband £100 a year till 1865, when he left her, and they had not since resided together. In 1870, the wife agreed, under pressure of a suit by the husband for restitution of conjugal rights, to allow him £300 per annum. She had saved out of her income £1000 a year for six years. There were two children, who were supported by the wife:

Held, that the wife being amply provided for, and there being no proof of misconduct on the part of the husband, the Court would not interfere with his marital rights, and bill dismissed with costs. *Guicometti v. Prodgere.* 726

See GIFT, 715, 718 *note*.
PRESUMPTION, 719.

MASTER OF SHIP.

See ADMIRALTY, 100.

MASTER AND SERVANT.

1. A person who puts another in his vice to do a class of acts, in his absence, necessarily leaves him to determine, according to the circumstances which arise, when an act of that class is to be done, and trusts him for the manner in which it is done; consequently he is answerable for the wrong of the person so intrusted, either in the manner of doing such an act, or in doing such an act under circumstances in which it ought not to have been done, provided that what is done is not done from any caprice of the servant, but in the course of the employment.

2. The plaintiff, a passenger on the defendants' line of railway, sustained injuries, in consequence of being violently pulled out of a railway carriage by one of the defendants' porters, who acted under an erroneous impression that the plaintiff was in the wrong carriage. The defendants' bye-laws did not expressly authorize the company's servants to remove any person

being in a wrong carriage, but they provided that no person should be allowed to enter any carriage or to travel therein without having first paid his fare and taken a ticket. They likewise provided that the porters should act under the orders of the station master, &c., and do all in their power to promote the comfort of the passengers and the interests of the company:

Held, that the act of the porter in pulling the plaintiff out of the carriage was an act done within the course of his employment as the defendants' servant, and one for which they were therefore responsible. *Bayley v. Manchester, etc., Railway Co.* 308, 313 *note*.

See ANIMALS, 434.
EJECTMENT, 154.

MERGER.

See FORMER SUIT, 383, 390 *note*.

MINES.

1. Declaration for mining under the plaintiff's land without leaving proper support, whereby the foundations of plaintiff's mill and other buildings gave way, and the building fell. Plea, that S, the plaintiff's predecessor in title, was seized in fee of the said land &c., and of the subjacent mines, and by an indenture of lease between S and certain persons as lessees, S demised for thirty-eight years, from the 25th of March, 1839, all the veins of minerals that should or might at any time be found or discovered under the said land, with full power to the lessees and assigns to get the minerals from the old pits, and sink fresh pits, they the lessees and assigns, making reasonable satisfaction to the lessor and his tenants for the damage done to them respectively by the surface of the lands being covered with rubbish or otherwise injured, or as he or they might sustain, as well by the injury done to the lands in sinking and getting the mines and minerals, as for such damage or injury as might be done or caused in the dwelling houses or other buildings of the lessor, by getting the minerals under or near to any of the dwelling houses or other buildings according to the covenant thereafter contained for that purpose (to wit), in case any damage

or injury during the term hereby granted shall happen to any of the dwelling houses, cottages, or other buildings, already erected, or to be hereafter erected on the land in lieu of the present buildings, and not of greater value than the present buildings were when erected, by reason of any minerals being got under them, or so near to them as to occasion such damage or injury, the lessees and assigns shall at their own cost, on six day's notice by the lessor and assigns, or his tenants, rebuild or repair any such buildings so damaged and injured, and put them in as good condition and repair as they were before the damage was done. And further that the lessees and assigns shall every year during the term pay to the lessor, besides the immediate damage to be paid to the tenant, at the rate of 40s. an acre for the damage done to the crops, &c., for the first five years, and such a price as arbitrators shall determine as rent for each acre that shall be damaged, after which the lessees shall have free use of the land during the residue of the term. The plea concluded with an allegation that the defendants became assignees of the lease, and were always ready and willing to perform the covenant. On demurrer:

Held, that the plea was good: for that the terms of the lease were sufficient to show by implication that it was intended that the lessees of the mines should have the right to work the mine so as to undermine the surface, subject only to paying damages according to the covenants. *Smith v. Darby*. 281

2. In 1840 a bed of coal, called the High Hazle Bed, was demised, with working powers, to persons from whom the defendants took by assignment. The lessees were to pay a minimum rent of 200*l*. as for 2*a*, 1*r*. 16*p*., and a further yearly rent at the rate of 85*l*. per acre for coal actually got beyond the 2*a*. 1*r*. 16*p*., "including all ribs and pillars left in working the said coal, except the pillars for the support of the shafts, the pillars between the deep and counter level, the pillars all round the estate, and the pillars under the homestead and farm buildings." These pillars, of specified dimensions, the lessees bound themselves to leave "during the whole of the term," and "they also covenanted to work the

mines according to the best of their judgment, skill, and discretion, in a good and workmanlike manner."

In 1837 the assignee of the lessor conveyed part of the land within which the mine lay to persons from whom the plaintiffs took with notice, reserving to the grantor the High Hazle Bed (except a small portion specified), and "the mines, veins, and bed of coal, fire clay, and other clay, stone and other minerals lying under the said bed called the High Hazle Bed," with powers to the grantor, his heirs and assigns, and his and their tenants and lessees, to be exercised "from and after the expiration of the term" for "carrying on the works of the mine, and getting and carrying away the said fire clay, &c." so reserved; and also reserving to the grantor the coal rent under the lease of 1840, with the necessary powers. Provision was made for rent for land used or occupied by the grantor for the purposes of the mine, and for compensation for buildings required or removed for that purpose, and for surface damage to the land; but it was specially provided that the grantor, his heirs or assigns, tenants or lessees, should not be liable for any damage caused to buildings which should thereafter be erected on the land conveyed, by the sinking of the land through mining operations in getting the "coal, clay, stone and other minerals hereby excepted and removed."

The pillars specified in the lease of 1840 were left; and the defendant's worked according to the usual course of mining in the district; but their workings caused a subsidence, which injured the land of the plaintiffs and buildings erected since 1837. The land would have subsided without the buildings.

Held (by Martin and Cleasby, B. B.; Bramwell, B., doubting), that, it appearing by the lease of 1840 to be the intention of the parties that all the coal should be removed, except the specified pillars, and the defendants having worked the mine in a proper manner, they were not liable for the injury.

By Bramwell, B., that so far as concerned the houses, the proviso in the conveyance of 1837 protected the defendants from liability, notwithstanding that the lease under which they held was antecedent to that deed. *Eaton v. Jeffcock*. 458

3. In 1799 the Duke of Cornwall, as lord of a manor, granted the freehold in a copyhold tenement to the copyholder, reserving "all mines and minerals within and under the premises with full and free liberty of ingress, egress, and regress, to dig and search for, and to take, use, and work the said excepted mines and minerals," the deed not containing any provision for compensation. Under the tenement was a bed of china clay, the existence of which did not appear to have been contemplated by either party at the time, no china clay having ever been gotten out of the lands of the duchy, though the existence of tin was well known. It was admitted in the cause that china clay could not be gotten without totally destroying the surface, and the process of getting tin by "streaming," which was an ancient, and at the time of the grant the most usual, mode of getting tin, was almost equally destructive. A bill by the owner of the surface to restrain the owner of the minerals from getting china clay having been dismissed by Wickens, V.C., on the ground that the reservation included china clay with the power to get it:

Held, on appeal that the china clay was included in the reservation, but that the surface owner was entitled to an injunction to restrain the owner of the minerals from getting it in such a way as to destroy or seriously injure the surface.

4. When a landowner sells the surface, reserving to himself the minerals with power to get them, he must, if he intends to have power to get them in a way which will destroy the surface, frame the reservation in such a way as to show clearly that he is intended to have that power.
5. The deed granted the property by the description of "All that copyhold tenement called Greys, consisting of a house with divers parcels of land, containing 103 acres (that is to say)" then followed parcels, concluding with "a parcel of land running with G. Moor, containing twenty-seven acres, which said tenement, called Greys, is now held for the life of G. H., by copy of Court roll."

Held, that on the construction of this grant, a piece of uninclosed land containing twenty-seven acres, and forming part of the waste of the

manor, and proved never to have been a part of the copyhold tenement, did not pass, although there was nothing else to answer the twenty-seven acres mentioned in the deed, and the 103 acres could not be made up without it.

6. The defendants G. and I., who were entitled to the minerals under Greys had granted a lease to their codefendants of the china clay under various lands, including great part of Greys. The lessees had entered Greys for the purpose of getting china clay, but had not got any, and long before the bill was filed had ceased to occupy any part of the estate, and were getting clay only from the twenty-seven acres of which the plaintiffs claimed to be owners, but to which they were decided not to be entitled. The defendants by their answer stated that they had no intention of getting clay at present out of Greys, but they insisted that they were entitled to do so:

Held, that the defendants "threatened" to get the clay so as to give the Court jurisdiction to interfere by injunction. *Heat v. Gill.* 514

MISTAKE.

See VENDOR AND PURCHASER, 674.

MISTAKE OF LAW.

See SPECIFIC PERFORMANCE, 654.

MUTUAL WILLS.

See WILLS, 112, 134 *note*.

N.

NEGLIGENCE.

1. The plaintiff occupied, for business purposes, the ground floor and the defendants the second floor of the same house, respectively, as tenants from year to year. There was a water closet on the defendant's premises to and of which they alone had access and use. After their respective premises had been closed on a Saturday evening, water percolated from the water closet through the first floor to

the plaintiff's premises and caused damage to his stock in trade. The overflow of the water was owing to the valve of the supply pipe to the pan having got out of order and failed to close, and the water pipe being choked with paper. The defects could not be detected without examination, and the defendants did not know of them, and were guilty of no negligence:

Held, that there was no obligation on the defendants to keep in the water at their peril; and that they were not liable to the plaintiff for the damage.
Rosa v. Fedden. 254, 259 *note*.

2. The defendants were a corporate body in whom were vested, by the Thames Navigation Act, 1866 (29 & 30 Vict. c. 89), certain powers and authorities for the preservation and improvement of the stream, bed and banks of the upper part of the Thames, including all powers and authorities before that act vested in the commissioners appointed for the purposes of the upper navigation of the Thames under earlier statutes. From these statutes it appeared that there were originally owners and occupiers of towing paths on the river banks who took toll for horses passing along them, and that such persons were bound to keep the towing path in repair; and that by the statutes the commissioners had extensive powers of supervision and control over the towing paths, and power to make orders respecting them and to regulate the toll to be taken by persons entitled to take it. They subsequently acquired, by the statutes, power to purchase and take lands compulsorily, and to execute works for the purposes of the navigation; and by the act of 28 Geo. 3, c. 51, s. 6, were authorized themselves to take toll, for, amongst other things, the towing paths purchased or hired by them. By the 35th Geo. 3, c. 106, ss. 18, 23, they obtained power to execute any works or repairs that they thought needful or proper, and to pay for them out of the rates and tolls, and also to make and establish a continued horse towing path throughout the navigation, and to purchase land for that purpose. By the Thames Navigation act, 1866, the defendants were authorized to take tolls and apply their funds to the expenses of the repair, &c., of the works vested in, acquired by, or constructed by them under the act, and to carrying into execution the purposes of that act and of the former acts.

In consequence of a part of the bank on the upper navigation of the Thames being out of repair and giving way, some horses of the plaintiff, which were engaged in towing a barge, fell into the river and were drowned. The defendants had, in pursuance of the powers vested in them in 1866, made a parol agreement with the owner of the soil of the towing path, at the place in question, for the use of such towing path at an annual rent, and having likewise acquired the use of the whole of the rest of the towing paths along the river, they were in the habit of taking an aggregate toll for the use of the whole of the navigation and towing path at Teddington Lock, which they had done in the present instance. The plaintiff having brought an action against the defendants for negligence in not keeping the towing path in repairs:

Held, that the defendants had power under their statutes to maintain and repair the towing path, for the use of which they were entitled to take a toll; that according to the decision in *Mersey Docks v. Gibbs* (Law Rep., 1 H. L., 93), the intention of the legislature in such cases is that the corporation shall have the same duties, and its funds shall be subject to the same liabilities, as the general law would impose upon a private person having and exercising the same rights; and consequently that, the defendants having provided the towing path under their acts, having power under such acts to maintain and repair it, and having invited the public to use it and taken toll for the use of it, were bound to take reasonable care that it was in a fit condition to be used as a towing path; and that the action was maintainable.

2. The towing path includes so much of the bank as is necessary and proper for the purpose of towing barges, and is reasonably and properly used as such. *Winch v. Conservators of the Thames.* 344
3. One who for his own purposes so manages his land as to collect there in abnormal quantities anything likely to do mischief if it escapes, is, *prima facie*, answerable for the damage consequent upon its escape.
4. The defendant's mines adjoined and communicated with the plaintiff's, and in the surface of the defendant's land

were certain hollows and openings, partly caused by and partly made to facilitate the defendant's workings. Across the surface of their land there ran a watercourse. In November, 1871, the banks of the watercourse (which were sufficient for all ordinary occasions) burst in consequence of exceptionally heavy rains, and the water escaped into and accumulated in the hollows and openings, where the rains had already caused an unusual amount of water to collect, and thence by fissures and cracks water passed into the defendant's, and so into the plaintiff's mines. If the land had been in its natural condition the water would have spread itself over the surface, and have been innocuous. The defendants were not guilty of any actual negligence in the management of their mines. In an action by the plaintiff to recover the damage he had sustained :

Held, on the principle of *Fletcher v. Rylands* (Law Rep., 3 H. L., 890), that the defendants were liable, although they were not guilty of any personal negligence, and although the accident arose from exceptional causes. *Smith v. Fletcher.* 422

See AGREEMENT, 146.
ANIMALS, 434.
BANKRUPTCY, 228.
DIRECTORS, 1, 28 *note*.
MINES, 458.
TRUSTEES, 591.

NEW TRIAL.

See DIVORCE, 484.

NOTICE.

1. Railway Company not liable for non-delivery, if desired for a special object unless notified thereof. 390

See ADMIRALTY, 417.
ANIMALS, 434.
EJECTMENT, 154.

P

PARENT AND CHILD.

See FRAUD, 169, 186 *note*.

PAROL EVIDENCE.

See LIBEL, 194.

PARTITION.

1. In order to maintain the plaintiff must have an actual or a constructive possession. 696 *note*.

See WILL, 684.

PARTNERS.

1. Where part of the assets of a partnership consisted of a government contract entered into in the name of one of the partners and containing a proviso against alienation :

Held, that upon a dissolution of the partnership, the partner in whose name the contract was taken, and who continued to carry it on, must be debited in the accounts with its value, to be ascertained by a reference to Chambers. *Ambler v. Bolton.* 806

PATENT.

1. Where a machine for which a patent had been granted was shown to produce work more expeditiously, more economically, and of a better quality than any previous machine :

Held (reversing the decision of Bacon, V.C.) that the patent could not be invalidated on the ground that the machine was formed by the mere arrangement of common elementary mechanical materials, producing results of the same nature as those previously accomplished by other mechanical arrangements and construction.

2. The public exhibition of a machine in which there are defects, owing to which it proves an entire failure, does not affect the validity of a subsequent patent for a machine, in which though similar in some of its details to the former, the defects are remedied so as to produce a serviceable machine. *Murray v. Clayton* 575

PAYMENT.

See AGREEMENT, 146.
PRINCIPAL AND AGENT, 217, 226 *note*.

PERSONAL LIABILITY OF EXECUTORS etc.

See TRUSTEE, 744, 747 *note*.

PLEADINGS.

See ADMIRALTY, 92.

POWER.

1. By a separation deed a sum of money was directed to be held by trustees upon trust for the wife for life, and after her death, as to four-sixth parts thereof, for F. W., one of the children of the marriage, who was then an officer in the army, during his life, and after his death for his children. And it was declared that it should be lawful for the trustees, if in their discretion they should think fit, to apply any portion of the fund, not exceeding £2,000, in or towards affecting the promotion of F. W. in the army. The trustees applied £850 in the way pointed out by the deed, but in consequence of the abolition of purchase of commissions in the army, under the royal warrant of the 20th of July, 1871, no further sum could be applied for the same purpose:

Held, that the purpose for which the power was given to the trustees having failed, the residue of the sum of £2,000 could not be raised and applied in any manner for the benefit of F. W. *In re Ward's Trust*. 597

See FRAUD, 169.
WILL, 736.

PRESUMPTION.

1. The presumption that a woman aged forty-nine years and nine months, who had been long married to a husband still living and had never had any children, would not have any by him, acted upon. *Matter of Milner's Estate*. 719

See EJECTMENT, 54.

PRINCIPAL AND AGENT.

1. A vendor, who has given credit to an agent, believing him to be the principal cannot recover against the undi-

closed principal, if the principal has bona fide paid the agent at a time when the vendor still gave credit to the agent and knew of no one else as principal.

2. R. & Co., were commission merchants, acting sometimes for themselves and sometimes as agents. Plaintiff, a merchant, had had dealings with them, and had never inquired whether they had principals or not, and had always settled with them. On the 15th of June plaintiff contracted to sell to R. & Co., 300 pieces of shirtings at a certain price, payment to be made in thirty days after delivery, with a discount of $1\frac{1}{4}$ per cent. Plaintiff delivered the shirtings (which were grey or unbleached shirtings), and the payment ought to have been made on Friday, the 25th of August. On the 24th R. & Co., asked for delay till the next pay day, September the 1st; and while plaintiff was considering what to do, R. & Co., on the 30th of August stopped payment. It turned out that R. & Co. had bought the goods for defendants under the following circumstances:

3. Defendants, merchants, had been in the habit of giving orders to R. & Co. for white and grey shirtings; when white were ordered, R. & Co. went into market, bought grey shirtings, had them bleached, and charged defendants with the price of the grey shirtings and of the bleaching, and 1 per cent. on the aggregate as their commission, with the charges of packing, &c. In previous transactions defendants had always paid R. & Co., generally in cash, i.e., on the next weekly pay day, and had never been brought into communication with those who supplied or those who bleached the goods. In the present case defendants gave a verbal order for 200 white shirtings, the price not being named, nor the mode of payment. R. & Co. having received the grey shirtings from plaintiff, got them bleached, and sent them to defendants, charging the price at which they had bought of plaintiff, the cost of bleaching, and 1 per cent. on the aggregate of those two sums, with the charges of packing, &c.; and defendants, with perfect good faith, paid R. & Co., on the next pay day after they received them, viz., on the 11th of August. On the above facts, the

Court having power to draw inferences:

Held, first, that the delay of plaintiff in taking no steps between the 25th and 30th of August was not laches such as would have precluded him, if otherwise entitled, from recovering payment from defendants; secondly,—assuming that there was authority, from the course of dealing between defendants and R. and Co., to establish privity of contract between defendants and those from whom R. and Co. obtained the goods,—that, after the bona fide payment by defendants to R. and Co., at a time when plaintiff still gave sole credit to R. and Co., and knew of no one else as principal, plaintiff could not come upon defendants for the price. *Armstrong v. Stokes*.

217, 228 note

See ANIMALS, 484.

MASTER AND SERVANT, 308, 313 note.

SPECIFIC PERFORMANCE, 509.

PRINCIPAL AND SURETY.

See SURETY.

R.

RAILWAY COMPANY.

See CARRIER, 390.

MASTER AND SERVANT, 308, 313 note.

REAL ESTATE.

See NEGLIGENCE, 254, 259 note.

REMAINDER.

See WASTE, 568.

WILL, 690.

RESCISSION.

See VENDOR AND PURCHASER, 675.

REVOCATION.

See VENDOR AND PURCHASER, 674

WILLS, 112, 134 note, 475, 478, 480, 483.

S.

SALE.

1. The purchaser of goods by sample ought to examine them without delay; and if he find that they are not conformable to the sample, he may reject them and rescind the contract—giving immediate notice that he does so, and that the goods are at the risk and disposal of the vendor.

2. Should the vendor not acquiesce, the purchaser should place the goods in neutral custody, duly apprising the vendor.

3. The purchaser is not entitled to hold by the contract and ask for other goods instead of those to which he objects.

4. Where in such a case certain purchasers had omitted to rescind the contract, and neither returned nor offered to return the goods, they were held liable for the price.

Per LORD CHELMSFORD: As I understand the law of Scotland, although the goods have been accepted by the purchaser, yet if he find that they do not correspond with the sample, he has an absolute right to return them. In England, if goods are sold by sample, and they are delivered, and accepted by the purchaser, he cannot return them; but if he has taken the delivery conditionally, he has a right to keep the goods for a sufficient time to enable him to give them a fair trial—and if they are found not to correspond with the sample, he is then entitled to return them.

Per LORD CHLMSFORD: In England, if a horse is sold with a warranty of soundness, and it turns out to be unsound, the purchaser cannot return the horse unless there is a stipulation that if the horse does not answer to the warranty the purchaser shall be at liberty to return it. But in Scotland, as I understand the law of that country, there would be an absolute right to return the horse upon the discovery of its unsoundness, without any specific stipulation to that effect. *Couston v. Chapman*. 187, 193 note.

5. The plaintiff bought of the defendant 500 tons of iron, to be delivered in about equal proportions in September, Octo-

INDEX.

ber, and November, 1871. In August, 1871, the defendants gave notice to the plaintiff that he did not intend to deliver any iron. In December, the plaintiff commenced an action for non-delivery, and claimed as damages the difference on the 30th of November between the contract and market prices of the iron :

Held, that the proper measures of damages was the sum of the differences between the contract and market prices of one-third of 500 tons on the 30th of September, the 31st of October, and the 30th of November, respectively *Brown v. Muller*. 429

6 Of cargo to arrive. 379

See AGREEMENT, 184, 379.
ARBITRATION, 375.
LEX LOCI, 499.
VENDOR AND PURCHASER, 674.
WARRANTY, 328.

SALVAGE.

See ADMIRALTY, 486, 487.

SECONDARY EVIDENCE.

See LIBEL, 194.

SERVICE.

See EJECTMENT, 154.

SETTLEMENT.

1. A voluntary settlement should contain a power of revocation ; if it does not, the parties who rely upon it must prove that the settler was properly advised when he executed it, that he thoroughly understood the effect of omitting the power, and that he intended it to be excluded from the settlement. If that is not established, and the Court sees, from the surrounding circumstances, that the settler believed the instrument to be revocable, it will, even after the lapse of nearly twenty years and the death of the settler, interfere and give relief against it. *Hall v. Hall*. 783

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accordingly built, and when the railway was completed the contractor left them on the land, and the agent of the company made an agreement with the contractor that he should be paid £500 a year for the cottages by way of rent with an option to the company to purchase them for £5000. This agreement was confirmed by a resolution of the board of directors. The company paid the £500 a year for some years, and then refused to pay.

Held, that the claim of the contractor being simply for payment of money could not be enforced in the Court of Chancery; and that though the contractor was unable to sue at law because the agreement was not under seal, he did not thereby obtain an equity to enforce a claim for money:

5. *Held*, also, that inasmuch as the contractor did not act in ignorance of the rights of the company, he could not claim compensation for having been induced to build on the land of the company. *Crompton v. Varna Railway Co.* 509

STOCK.

See BROKER, 600, 621 *note*.

STOCKHOLDERS.

1. G., a shareholder in a limited company, transferred his shares to A., an infant, more than a year before the company was wound up. A. transferred to D., also an infant, who transferred to B. three months before the winding-up. The transfers were all registered. B. who was *sui juris* at the date of the transfer, afterwards became bankrupt:

Held, that G. continued liable as a member till B.'s transfer was registered, and that he must be placed on the list of contributories as a past shareholder. *Gooch's Case.* 813.

See AGREEMENT, 529

BROKER, 600, 621 *note*,

DIRECTORS, 1, 28 *note*.

SUBROGATION.

See SURETY, 298, 307, *note*.

SURETY.

1. On a continuing guaranty for the honesty of a servant, if the master discovers that the servant has been guilty of dishonesty in the course of the service, and instead of dismissing the servant, he chooses to continue him in his employ without the knowledge and consent of the surety, express or implied, he cannot afterwards have recourse to the surety to make good any loss which may arise from the dishonesty of the servant during the subsequent service.

2. Declaration on a contract whereby the defendant guaranteed the honesty of one J. S., a servant in the employ of the plaintiff, to the extent of 50%. The declaration set out the employment of J. S., and that it was his duty to collect money for the plaintiff and account to her for all sums of money so collected; and that the plaintiff had, before the giving of the guaranty, held in her hands a sum of money belonging to J. S., as a security for the proper performance by J. S., of his duty, which sum the plaintiff had agreed to pay back to J. S., on receiving the defendant's guaranty. The declaration then alleged that in consideration that the plaintiff would pay over to J. S., the money so held and continue him in the service of the plaintiff, in the same capacity as before, the defendant guaranteed and promised the plaintiff to make good and be answerable to her for any loss not exceeding 50% which she might at any time sustain through any breach of his duty by J. S., during the continuance of such service. Breach, that J. S., failed to pay over money to the amount of 50% which he had collected. In answer to this declaration the defendant divided the time during which the service lasted, and during which the loss was sustained into two periods: first, from the 8th of June, 1869, when the contract was made, to the 20th of November, 1869; secondly, from the last mentioned day to the 6th of April, 1871, when the service terminated. As to the first, the defendant admitted his liability. As to the other he pleaded, on equitable grounds, that J. S., had been guilty of defalcations in the course of his service between the 8th of June and the 20th of November, 1869, which the plaintiff discovered on the latter day, and that the plaintiff

without communicating such discovery to the defendant, and while the defendant was ignorant of J. S.'s dishonesty, agreed with J. S. to continue him in her employ as before, and J. S. agreed to pay to the plaintiff 8*l.* a month on account of the previous defalcations; that J. S. was continued in plaintiff's service accordingly on those terms; and that the loss in respect of which the plea is pleaded was occasioned by acts of dishonesty committed by J. S., during the continuance of the service after the 20th of November, and between that time and the termination of the service, the defendant being during that time wholly ignorant of the previous defalcations of J. S.; and that by reason of the plaintiff not giving the defendant notice of such defalcations he was prevented from revoking the guaranty:

Held, on demurrer, that the plea was a good answer to the declaration.

By Cockburn, C. J., Lush and Quain, J.J., on the ground that, as the obligation of the surety is continuing, the obligation of the creditor also continues; and that the representation and understanding, as to the trustworthiness of the servant, on which the contract was originally founded, continues until its termination.

By Blackburn, J., that the surety was discharged, because by continuing J. S. in her service, after knowledge of the misconduct, the plaintiff had deprived herself of the right of terminating the service, a right which the surety was entitled in equity to have exercised for his protection. *Phillips v. Foxall.* 250, 272 *note*

8. The plaintiffs lent to B. and P. who were traders, 300*l.*, for the repayment of which the defendant became surety. At the time of the loan B. & P. assigned by deed dated the 25th of August, 1870, to the plaintiffs, as security for the debt, the lease of their business premises and plant, fixtures, and things thereon. The deed provided for the repayment of the loan upon the 25th of August, 1871, and for the payment of interest on the 25th of February, 1871, and stipulated, that until default in payment of either the principal or interest, B. & P. should continue in possession of the property assigned to the plaintiffs: and that upon such default the plaintiffs should not sell without giving B. & P. one month's notice in writing. This deed

was not registered under 17 & 18 Vict. c. 88. B. & P. failed to pay interest upon the 25th of February, but the plaintiffs did not enter into possession. About a week before the 5th of August, the plaintiffs received notice that B. & P. were insolvent, but they allowed them to continue in possession, and on that day B. & P. filed a petition for liquidation under the bankruptcy Act, 1869, and were adjudged bankrupts. The trustee under the bankruptcy seized and sold the goods and chattels assigned by the deed:

Held, that the plaintiffs, by their omission both to register the deed and to seize the property assigned to them on default of payment of the interest, had deprived themselves of the power to assign the security, to the surety, and that owing to their laches he was discharged to the amount that the goods were worth. *Wulff v. Jay.* 298, 307 *note.*

SURPRISE.

See DIVORCE, 494.

T.

THREATEN AND INTEND.

See WORDS, 574.

TITLE

To upper and lower apartments.

254, 259 *note.*

To building irrespective of land on which built.

254, 259 *note.*

See BAILMENT.

TORT.

See FORMER SUIT, 883, 890 *note.*

TRADE MARK.

1. In order to constitute a ground for interference by a Court of Equity to protect a manufacturer against the use, by another person, of the particular name of his manufactured article, it is not necessary that there should

be a *malæ mens* towards the first purchaser of the article thus imitatively designated. The fault of the imitator is, that the first purchaser may be enabled through this unwarranted designation to retail a simulated article at a lower price than would be demanded for the original article, and so the original manufacturer may be injured.

2. Where a trade mark is not actually copied, the existence of a fraudulent intention is a necessary element in the consideration of a case of this description. The party complained of must be proved to have done the act with the fraudulent design of passing off his own goods as those of the plaintiff. It is not necessary, however, to show an exact resemblance between the original and the counterfeit—it is sufficient if there is such a resemblance as will mislead an unwary purchaser.

3. A name may become a trade denomination, and as such the property of a particular person who first gives it to a particular article of manufacture. The employment of the name by another person for the purpose of describing an imitation of that article, is an invasion of the right of the original manufacturer, who is entitled to protection by injunction. *Wotherspoon v. Currie*. 29

4. A fancy name which designates a particular kind of article may be in general use in price lists which circulate between manufacturers and retail dealers without prejudicing the right of the inventor to the exclusive use of the fancy name as a trade mark in the sale of the article to the public.

5. A trade mark to which a trader had originally an exclusive right may in course of time become *publici juris*, and the exclusive right may be lost. The proper test of this having happened is, that the use of the trade mark by other persons has ceased to deceive the public as to the maker of the article.

6. The exclusive right to the use of a fancy name as a trade mark is not lost by the inventor habitually using it in conjunction with his own name as maker of the article.

7. The Court will not interfere by injunction to restrain the imitation of a trade mark, if there is false representation in the trade mark, or if the trade itself is fraudulent.

8. And *semble*, such false representation or fraud would be a good defence to an action at law for imitation of the trade mark, on the ground that *as turpi causa non oritur actio*.

9. But a collateral misrepresentation by the owner of the trade mark will not disentitle him to relief either at law or in equity.

10. In a case where the plaintiff, whose trade mark was "Ford's Eureka Shirt," had falsely represented in his invoices and in a few advertisements that he was a "patentee" of the shirt:

Held, that such false representation was not sufficient to prevent him from sustaining an action at law; and that his right at law being clear, he was entitled to an injunction in Chancery. *Ford v. Foster*. 538

11. The name of the place of origin of an article may become a trade mark. Consideration of the kind of evidence necessary to support an interlocutory injunction in such a case. *Radde v. Norman*. 776

12. A manufacturer who has produced an article of merchandise [e. g. a new pattern of cloth] and applied to it a particular fancy name, and sold it with a particular mark, under which name and mark it has obtained currency in the market, acquires an exclusive right to the use of such name and mark and is entitled to restrain all other persons from using such name and mark to denote articles similar in kind and appearance, although he may have no exclusive right of manufacturing the article. If the use of such name and mark, by any other person than the first inventor, has been adopted for the purpose of selling goods of an inferior quality, though of similar external appearance, so that purchasers may be misled into the belief that they are buying the goods of the first inventor, the injury to the first inventor is one for which he is entitled to compensation in damages, and relief by injunction. *Hirst v. Denham*. 533

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TRESPASS.

See MINES, 458
NEGLIGENCE, 423
TROVER.

TROVER.

1. The plaintiff sued the defendants, cotton brokers, in an action of trover, to recover the value of thirteen bales of cotton. The cotton was fraudulently bought by B. from the plaintiffs' brokers; the defendants, without notice of any fraud, bought, in their own name as principals, the cotton from B., and afterwards sold it to M. at the same price at which they had bought it, charging a commission. The defendants obtained B.'s signature to a delivery order, and took delivery of it from B.'s warehouse and conveyed it to a railway station, whence it was forwarded to M., by whom it was spun into yarn. The defendants in buying the cotton intended to act as brokers, believing the cotton would suit M. Afterwards the plaintiffs demanded the cotton from the defendants. The jury found that the cotton was bought by the defendants as agents in the course of their business as brokers, and that they dealt with it only as agents to their principal:

Held, by Martin, Channel, and Cleasby, BB., affirming the judgment of the Queen's Bench, that the defendants were liable to the plaintiffs in trover for the value of the cotton; Kelly, C.B., Byles and Brett, JJ., dissenting.

By Martin and Channel, BB., that the defendants having bought the cotton as principals from B., it was immaterial that they intended to deal with it only as agents to their principal; and that whoever deals wrongfully with the goods of another is equally liable whether he be agent or principal.

By Cleasby, B., that by reason of the real principals not being known, and therefore not disclosed at the time the bargain was made, the defendants necessarily became the parties to the contract until the real principals being ascertained were adopted by the sellers, and by their dealing with the cotton became liable for a conversion.

By Kelly, C.B., and Byles, J., that

the defendants conversion, in only as brokers' minion over the right and for the

By Brett, J., detention, which mere asportation reference to the quality in chattels, is that the defendants' brokers by negotiation purchase and a delivery order, conversion. *Per*

See BAIL

TRUST AND

1. Trustees were charged occasioned by a trust funds on the country, and the property was down a London street the hotel, inclusive, at nearly double advanced. The worth much less advanced. The true account of the charge which the advance
Held (reversing *con*, V.C.), that chargeable with the *Budge v. Gummot*
2. A liquidator appointed to wind up personally responsible employed by him in liquidation for any liquidation. *Hook*

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POWER, 50

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ULTRA V

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VARIANCE

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VENDOR AND PURCHASER.

1. Where property is sold by auction it is the office of the particulars to give an accurate description of the property, and of the conditions to state the terms on which the sale is made.
2. Therefore, where certain property was put up for sale, and in the particulars, which were advertised, was described as being an absolute reversion in a freehold estate, falling into possession on the death of a lady then in her seventieth year; and by the conditions of sale, which were read for the first time at the auction, just previously to the commencement of the biddings, the property was stated to be sold subject to two mortgages; on bill filed by the purchaser at the auction who stated that he was deaf, and did not understand that by the conditions he was buying only an equity of redemption in the property:
Held, that although his solicitor paid the deposit on his behalf after having read the conditions, he was entitled to a decree for the rescission of the contract and for a return of the deposit with interest, and a declaration of lien:
3. *Held*, also that though in an ordinary case, inasmuch as the plaintiff's carelessness had contributed to the mistake, he would not have been entitled to the costs of the suit, he might have them on account of having, previously to the commencement of the suit, offered, on condition of having the contract rescinded and the deposit returned, to pay the costs of the sale.
4. The Court looks with disfavor on the practice of not producing the conditions of sale till the actual time of the auction. *Torrance v. Bolton*. 674

See AGREEMENT, 379.

ARBITRATION, 375.

BAILMENT, 214.

PRINCIPAL AND AGENT, 217, 228 note.

SALE, 187, 193 note, 429.

WARRANTY, 338.

WARRANTY.

1. The defendants being shoe manufacturers contracted with the plaintiffs to supply 30,000 black army shoes as per sample, to be delivered free at a wharf, to be inspected and quality approved before shipment, and payment to be made in cash at the time of each delivery. It was well known to the defendants that the shoes were required for the French army for a winter campaign. A sample shoe was deposited, and a large number of shoes having been inspected and approved by the plaintiff's agent under the contract, invoices for such shoes were made out and signed by the plaintiff's agent, and the shoes were then sent to Penning's Wharf, London, which had been named by the plaintiffs as the place for delivery. On the inspection of the shoes the soles were not opened, and without opening them it was impossible to tell what the "fillings" of the soles consisted of. The shoes were paid for by the plaintiffs and forwarded by them to Lille, for the purpose of meeting a contract entered into with the French government for the supply of shoes for the French army. Circumstances had in the mean time occurred which gave rise to suspicions on the part of the plaintiffs that the shoes so forwarded might contain paper in the soles; and the defendants knowing at that time that the shoes were intended to be sent to Lille under a contract for the supply of shoes to the French army, and would have to be passed by the French authorities there, signed a letter to the plaintiffs agreeing to take back the shoes that might be thrown on their hands in consequence of paper being found in them, it being understood that they would not take back any large number of shoes if paper should be found in only a few pairs. The shoes were tendered to the French authorities at Lille, and rejected because a great number of pairs were found on being opened to contain paper. A considerable number of the shoes being afterwards opened, a very large proportion of those so opened were found to contain paper in the soles. Shoes with paper in the soles are not fit for army shoes. A small quantity of shoes, which had been

tract, and the price of which had been paid, had been delivered at Fenning's Wharf and not forwarded to Lille. The plaintiffs gave notice to the defendants that they rejected the shoes delivered, and refused to receive any more, and brought an action against the defendants for breach of contract, claiming to be entitled to throw the shoes already delivered under the contract upon the defendants' hands at Lille and at Fenning's Wharf, and to recover (inter alia) the amount of the price of the shoes. The jury found at the trial that the defects in the shoes could not have been discovered by any inspection which ought reasonably to have been made:

Held, that the letter of the defendants must be treated as a new and additional contract between the parties, adding fresh terms to the original contract with reference to the difficulties that were likely to arise with the French authorities at Lille, and upon the proper construction of the whole contract, including the letter, the plaintiffs were entitled to throw the shoes on the defendants' hands at Lille and at Fenning's Wharf, and recover the price of them.

Per Bovill, C.J., and Byles, J., but for the letter, and under the contract as it originally stood, the plaintiffs could not have rejected the shoes and recovered the price of them, having accepted them and dealt with them as their own property.

Per Brett, J. Apart from the special agreement contained in the letter, the plaintiffs would have been entitled to return the shoes on the defendant's hands at Lille, and to recover the price of them, inasmuch as the inspection in London was ineffectual by reason of a latent defect for which the defendants as manufacturers of the shoes were responsible, and the shoes were rejected immediately upon opportunity occurring for the discovery of such defect. *Heilbutt v. Hickson*. 328

See ADMIRALTY, 314.
DIRECTORS, 625.
SALE, 187, 193, note.

WASTE.

1. A tenant for life was executrix of a preceding tenant for life, both being impeachable for waste, and both hav-

ber:

Held, that the *Statute of Limitations* began to run against the remaindermen in fee from the time when the timber was cut, and not from the time of the death of the tenant for life:

2. *Held*, that though an injunction and an account were granted against the existing tenant for life, yet as no injunction could be granted against the preceding tenant for life, no account could be granted against her executrix for waste committed by the preceding tenant for life. *Higginbotham v. Hawkins*. 568

WATER.

See NEGLIGENCE, 423.

WILL.

1. The phrase in a will "estate tail in possession" does not necessarily mean actual possession, but may be construed as meaning entitled to a vested estate tail in the property, though it may be vested in remainder and the party entitled may not be in actual possession, a previous life estate existing at the time.
2. There may be a particular clause in a will which on one construction appears to offend against the law relating to perpetuities, but, if it is fairly capable of another construction which avoids that objection, the latter construction will be preferred, especially if it is found to be in accordance with the general intention of the will.
3. Where there has been a decree (all the parties interested being before the Court), long acquiesced in, which declared a direction for accumulation to be void for remoteness, but also declared that the will was well executed, and that the trusts thereof (except that direction) ought to be carried into effect, the presumption will be that a possible objection to a similar clause in the will had not been overlooked, but had been considered and decided on before the declaration to carry the trusts of the will into execution was made.

4. The words "provided always" are to be considered as words of reference to all that has gone before them. They constitute a qualification of the preceding limitations.
5. A testator after giving several legacies directed his trustees to invest dividends and rents, and profits, and the annual proceeds of his real and personal estates, during the time that any person beneficially interested in those estates should be under twenty-one, in order to accumulate the personal estate. They were then to hold his real and personal estates for his first grandson, the eldest son of his daughter, then living, for his life, and after his decease for the first and other sons of that grandson in tail, remainder over to the other sons of the daughter. After other remainders there was an ultimate trust for the testator's right heirs and next of kin according to the nature and tenure of the trust estates respectively. Then followed this proviso: "I declare it to be my will and meaning, that such person as shall under this my will be entitled to an estate tail in possession in my real estate, shall not be absolutely entitled to my leasehold and personal estates until he, &c., shall attain the age of twenty-one, and that my leasehold and personal estate shall absolutely belong to such person, &c., as shall first attain the age of twenty-one and become entitled to an estate tail in possession in my real estates under the trusts aforesaid." The eldest grandson was in possession of the life estate—his eldest son died under twenty-one without issue—but his second son attained that age during his father's lifetime:
Held, that this proviso was not a new and independent disposition, but a qualification of all the preceding limitations:
6. *Held*, also, that the second son fulfilled all the conditions of the proviso and was absolutely entitled to the personal estates. *Martelli v. Holway*. 44
7. Exposition and effect of the Roman-Dutch Law prevailing in the Cape of Good Hope, in respect to a mutual will made by husband and wife.
 First, such mutual will is to be construed as a separate will; the disposition of each spouse being treated as applicable to his or her half of the joint property.
8. Secondly, each spouse is at liberty to revoke his or her part of the will during the co-testator's lifetime, with or without communication with the co-testator, or after the co-testator's death.
9. The power which a surviving spouse has to revoke a mutual will, as far as affects half of the property, is taken away upon the concurrence of two conditions: where the will disposes of the joint property on the death of the survivor, the property being consolidated into one mass for the purpose of a joint disposition of it; and (2), if the survivor has accepted some benefit under the will.
10. A mutual will made by husband and wife having community of goods, providing for payment of debts, with provisions for children with grandchildren, and nominating sole and universal heirs:
Held, to be revocable by the surviving spouse, who had not adiated or accepted the provisions therein given, so far as affected her property, and that she was entitled to claim her half of the inheritance. *Dennyssen v. Mostert*. 112, 134 *note*.
11. A testator devised his hereditaments to his son for life, with remainder to F., his son's eldest son, for life, with remainder to the first and other sons of F., successively in tail male; and for default of such issue, to R., the second son of his son, for life with remainder to the first and other sons of R., successively in tail male; and for default of such issue, to the third, fourth, and other sons of his son thereafter to be born successively in tail male; and for default of such issue, to his daughter I., for life, with remainder to her first and other sons in tail male; and for default of such issue, to his granddaughter E., for life, with remainder to her first and other sons in tail male; and for default of such issue, to his granddaughter J., for life, with remainder to her first and other sons successively in tail male; and for default of such issue, to his granddaughter S., for life, with remainder to her first and other sons successively in tail male; and for default of such issue, to all and every fourth and fifth and other daughter or daughters of

one after another, and to the heirs males of their bodies; and for default of such issue, "to the use and behoof of all and every other the issue of my body;" and for default of such issue to his right heirs. The will also contained a wish that the estates should be retained in the hands of one person, and should not be dispersed, and a provision that any female who inherited should with her husband (if married) assume the testator's name and arms under the penalty of forfeiting the estates. A muniment box was directed to go to the person entitled from time to time to the estates:

Held, 1st, that the words "issue of my body" in the penultimate limitation, were to be read in the same sense as "heirs of my body"; 2dly, that, having regard to the whole will, that devise could not be read as giving the estate per capita in joint tenancy to all who came within the class at the time the estates vested in possession; 3dly, that the words "all and every" did not import that all were to take at the same time, but were satisfied by all taking in succession; and 4thly (Bramwell, B., dissentiente), that the word "other" was to be read not as a word of exclusion, but of completion; and that upon these principles of construction, there was, by virtue of the penultimate limitation, a vested remainder at the death of the testator in tail general to which his son then became entitled.

12. This remainder descended to F., who duly executed a disentailing deed. He devised the estate to the defendant's father, from whom it descended to the defendant. In actions of ejectment (a), by persons claiming as issue of the body of the testator as joint tenants per capita at the time the estates vested in possession (b), by the heiress in tail general of the testator at the same period (c), by the heir of the survivor of all the issue of the testator living at his death (other than these included in the particular limitations), and (d) by the heir in tail of the testator at his death, these being excluded who came within the particular limitations:

Held, that the defendant was entitled to judgment. *Allgood v. Blake*.

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13. A testator by his first will, executed

disposed of all his realty and personality and appointed an executor. By his second and last will, executed in Italy, where he was domiciled at the time of his death, according to the law of Italy, he appointed his wife his universal heiress, and the will contained a revocatory clause in the following terms; "I erase, revoke and annul every other act or last will which I may have made."

The Court held that the Italian will revoked the disposition of the personality and the appointment of executor contained in the English will, and that the Italian will alone was entitled to probate. The executor of the English will, who propounded it as entitled to probate with the Italian will, was condemned in costs. *Cottrell v. Cottrell*. 475, 478 *note*.

14. A testator, under the false impression that his will was invalid, tore it up. Immediately afterwards, on reconsideration, he collected the pieces, and placed them together amongst his papers of importance, and preserved them until his death:

Held, that as the act done was not accompanied by an intention to revoke a valid will, it was ineffectual, and the will was admitted to probate. *Giles v. Warren*. 478

15. The deceased executed a will and codicil. In the latter she referred in several paragraphs to the dispositions contained in her will, and more particularly she bequeathed a certain legacy to be held under conditions stated in her will. She subsequently destroyed the will by burning it, but preserved the codicil:

Held, that as the codicil was not revoked by any of the methods prescribed by the Wills Act, it must be admitted to probate. *In re Turner's goods*. 480

16. The testator, in a letter addressed to his brother, which was signed by him in the presence of two witnesses, directed his brother to obtain his will and burn it without reading it:

Held, that the letter was a writing duly executed declaring an intention to revoke the will, and administration with the letter only annexed was granted to the next of kin of the deceased. *In re the goods of Durance*. 483

17. A testator directed his trustees, after the failure of limitations for life and in tail, to sell his real estate and pay a third of the proceeds unto and amongst the children of A. H., deceased, except J. G. H., who should be then living, and the issue of such of them as should be then dead leaving issue, and the issue of J. G. H., except his son J. W. H., share and share alike; the issue of deceased children of A. H., to have no greater share than their parents would have had if living, and the issue of J. G. H., to have no greater share than the issue of any other child of A. H. He gave another third upon trust to pay the income to P. J., for life, and after her decease to pay and divide such third share unto and amongst all the children of P. J., who should be "then living," and the issue of such as should be then dead, such issue to take no greater share than their parents would have had if living. At the end of the will was a proviso that if his estate should ever be sold under the above trust, and the money, or any part of it, become payable to the issue of A. H. and P. J., or the issue of J. G. H., (except J. W. H.), or any of them, and any one or more of such issue should be then dead having left lawful issue, then the issue of such issue as should be so dead should have the share to which their, his, or her parent would have been entitled if living:

Held, that a child of P. J., who survived her, but afterwards died before the period of distribution leaving issue, acquired a vested interest which was not by the final proviso divested in favor of the issue of such child; the word "issue" being held not to apply to children of P. J. *Heasman v. Pearce.* 537

18. A testator gave his residuary personal estate upon trust to pay the income equally between his three daughters, F., E., and C., during their respective lives; and if all or any of them should die leaving issue, to pay one-third of the principal amongst the issue of each daughter so dying, in equal shares; and if only one such daughter should die leaving issue, then in trust to pay and apply the whole residue equally amongst the issue of such one daughter; but if all the daughters should die without leaving issue, then over. C. died

leaving issue, and afterwards F. died without leaving issue:

Held (reversing the decision of Wickens, V.C.), that cross limitations were to be implied between the daughters and their families, and that the issue of each daughter were, for all purposes, to be ascertained at her own death; and that therefore one moiety of F.'s share was payable to the issue of C. living at C.'s death, and the other moiety went by way of accretion to E.'s original share. *Ridge's Trusts, matter of.* 559

19. A testator directed his trustees to pay the income of one moiety of his residuary estate to his widow during her life, and to divide the other moiety between his children in equal shares as tenants in common.

20. Advances were made by the testator to some of his children after the date of his will:

Held, affirming the decision of Bacon, V.C.), that the advances could only be brought into account for the benefit of the children among themselves, and that the widow was not entitled to have her income increased by having the advances brought into account in estimating the residue. *Meinertzen v. Walters.* 563

21. The testator devised and bequeathed all his property "of every description," to trustees "for the following uses, intents and purposes, viz." he left "the sum of £56 per annum to be paid quarterly to his wife," H. R. He gave to A. L. "the sum of £50 during her life." He left £800 per annum out of the proceeds of an East Indian estate, to be appropriated by his trustees to the maintenance and education of the eight children of his daughter, I. H., wife of Captain H., provided the children should take his name, "under forfeiture of" the £800 per annum, should they decline to do so. If there should be an increased profit to £800 per annum, testator bequeathed the same as therein mentioned. If any of the children should die, their mother should have "the benefit of the deceased child or children's share or shares." The trustees should have the power, should any one of the children get into debt, to forfeit his share, and divide it with the other children. The trustees should have power to sell the East Indian es-

not be sufficient to pay the annuities to the children; the proceeds of the sale to be invested in certain bonds, "in the names of said trustees for the benefit of" the children. Should the profits not reach £800 annually from the working or sale of the estate, then the trustees should "charge the residue of the testator's property to make up the said annual sum of £800. Should the sale realize more than enough, when invested, to pay the sums, the extra proceeds should be invested in the aforesaid bonds for the benefit of I. H., but the sum to be paid to her from the said investment should not exceed £500 annually:

Held, that the annuity to the testator's widow was for life only; but that the annuities to the children of I. H. were perpetual. *Hicks v. Ross*, 684

22. Testator, who died in 1854, gave all his property to his wife for life, and after giving certain pecuniary legacies and annuities, devised and bequeathed to his son C. all the residue, after his mother's decease, and to his heirs, and in case C. should die leaving no issue, then his freehold estate was to be equally divided between his (testator's) surviving children or their families. All the children of the testator survived their mother, who died in 1861, and, excepting one, all (two without issue, two leaving children, one leaving a child, and the issue of another child) died in the lifetime of C., who died in 1869 a bachelor and intestate:

Held, that this was a gift on the death of C. without leaving issue living at his death to the other children of the testator then living, and to the families of such of them as were dead:

23. *Held*, also, that "families" meant children, and not descendants of the testator's children.

24. In a suit for partition a question of law arose; but the Court, no one objecting, exercised jurisdiction, but ordered the decree to be prefaced with a statement of the desire of all parties, other than that of an infant, that the case should be decided in this Court. *Burt v. Hellyar*. 690

25. A testor devised a freehold estate to
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trusts upon trust to permit his son, G. A., and his assigns to receive the rents, issues, and profits during his life, and after his death upon trust to permit the first son of G. A. and the heirs male of his body to receive the rents, &c., during their respective lives severally and successively in tail male:

Held, that the first son of G. A. took an estate tail in the property, and not merely a life estate. *Hugo v. Williams*. 704

26. Gift by will to the Kent County Hospital. There being no hospital having precisely that name:

Held, that a general hospital must be presumed to have been intended, and the Kent County Ophthalmic Hospital could not take the legacy, and that it must be divided between two hospitals — viz., the Kent and Canterbury Hospital, and the West Kent General Hospital, which together supplied the place of a general county hospital. *Alchin's Trust*. 707

27. A testator bequeathed to his sister Susan all the property he might die possessed of for life, and after her decease he desired the property to be equally divided among his brothers and sisters, and should any of his brothers or sisters die (leaving issue) during the lifetime of his sister Susan, the share which would have been theirs to be equally divided among their children:

Held, that the children of a brother who died fifteen years before the date of the will were entitled to take the share of their deceased parent. *Adams v. Adams*. 720

28. By a settlement dated the 6th of January, 1858, the settler declared that a sum of money should be held on trust as he should by deed or will appoint, and in default of appointment, in trust as therein mentioned. A will made by the settler five weeks before the settlement contained a general residuary bequest:

Held, that although a general residuary bequest would operate as an execution, of a power in a subsequent settlement, still the Court had power in construing both instrument, to consider the surrounding circumstances, which showed that the settler never intended the settlement to be revoked by a prior will; and that consequently

the will was not an execution of the power. *In re Ruding's Settlement*. 736

39. Testator, by will made in 1821, after a gift of leaseholds to his daughter E., gave all the remainder of his property whatsoever to his wife D., the income to her for life, and at her death unto E., for her own benefit and her children, or one only child if she should have any (all that was given to E., being for her own benefit and not to be subject to the debts, control, or disposition of any husband she might marry); but if E. should die without issue the leaseholds were to be enjoyed by D. for life, and at her death, to his sister S. for her life, and at her death, together with all that was left to D. for her life, to be equally divided between all the grand-children of S.

E. died without having had a child.

Held, that E. was entitled absolutely both to the leasehold specifically bequeathed to her and to the residue given subject to D.'s life interest, and that the limitations over, if E., "should die without issue," were void for remoteness. *Fisher v. Webster*. 748

- 80 A testator, by will dated in 1857, bequeathed to his wife all sums of money that had come to his hands as part of her patrimony for her sole use and benefit, with the option of leaving it invested at 5 per cent. to be paid her quarterly or if she wished to draw it out, then the property most suitable for sale to be disposed of to raise the amount due to her, being in fact a charge upon the property; and if she so desired, this, as well as all just debts and obligations due from him, to be discharged as the first act of his executors:

Held, that the wife's patrimony was to be treated as a debt, and a charge on the specifically devised property as well as the rest of the property.

31. Bequest to wife of furniture and effects, and the free occupancy of a house for life, after which the effects to revert back to the estate:

Held, that the free occupancy of the house entitled the wife either to reside in it or to let it during her life.

32. Devise to sons and daughters of an equal share in all the income of real property:

Held, that the devise of the income of the estate passed the fee.

33. Direction that any property might be sold except Glencoe, which was to remain in the family as long as there was a lineal son descendant of before named sons, and if no lineal male descendant from the eldest, the next to be entitled, and so on:

Held, that this clause created an estate tail in possession in the eldest named son. *Mannox v. Greener*. 814
See LEGACY, 772.

WORDS.

"All and every other the issue of my body,"	436
"Default of such issue."	436
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"Other the issue,"	436
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See CONSTRUCTION.
HOSPITAL.
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WRONGDOERS.

See FORMER SUIT, 383, 390 *note*.

